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CURRENT TOPICS.

THE select committee appointed by the English House of Commons, to inquire into the expediency of altering the law so as to render masters liable for injuries occasioned to their servants by negligent acts of managers, foremen and others, to whom the general control of workshops and works is committed, and whether the term "common employment" could be defined by legislative enactment more clearly than it is by the law as it at present stands, have submitted their report to Parliament. The committee find, after a thorough examination of the adjudications on the subject, both in Great Britain and America, that at present a master is not liable to any servant for any injury which arises from the act or default of any fellow-servant, whether that fellow-servant be in a position of authority or not; and in ascertaining whether the person to whose act or default the injury is due is a fellow-servant, the widest possible construction is given to the term "common employment." The committee are of opinion that the effect of abolishing the defense of "common employment" would effect a serious disturbance in the industrial arrangements of the country, and "can not express their opinion on the question of the public policy involved in the existing law better than by adopting the language of the distinguished American judge who decided the case of Farwell v. The Boston and Worcester Railway Corporation: 'When several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much upon the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the other, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for an indemnity in the case of loss of life by the negligence of each other.'" The committee are of opinion that no case is made out for any alteration in the law relating to the liability of employers to their workmen for injury in the course of their employment, except in two particulars; and in respect to these the committee are of opinion (1) that, where the actual employers can not personally discharge the duties of masters, or where they deliberately abdicate their functions and delegate them to agents, the acts or defaults of the agents who thus discharge the duties and fulfil the functions of masters, should be considered as the personal acts or defaults of the principals and employers, and should impose the same liability on such principals and employers as they would have been subject to had they been acting personally in the conduct of their business, notwithstanding that such agents are technically in the employment of the principals; (2) that the doctrine of common employment has been carried too far where workmen employed by a contractor, and workmen employed by a person or company who has employed such contractor, are considered as being in the same common employment. Such cases do not come within the limits of the policy on which the law has been already justified.

WE DEVOTE a considerable portion of our space this week, and add four extra pages of reading matter, to print a mass of correspondence and other matter relating to the charges which have been made against the integrity of Judge Dillon, in connection with the foreclosure suit of the Central Railroad of Iowa. In doing so we but discharge a duty which, as legal journalists, we owe not only to an honest and distinguished judge, who has been most atrociously assailed, but also to the legal profession and to society. It can not be denied that the strongest bulwark of public order is the general confidence which the people have in the integrity of the judiciary. If the evil day should ever come when this confidence shall have been destroyed, either by the misconduct of the judges themselves, or by the calumnious attacks of disappointed litigants, disseminated through a subsidized press, disputants will take the law into their own hands, and private grievances will be settled, according to the advantages of each party, by alternate force and fraud. The letters of counsel in the case in question, which we print elsewhere, confirm the statements made in the letter of Judge Dillon to Governor Reynolds (*ante*, p. 88), and show that the charges made against him were *false in every particular*. They go further; they unmask the motives which prompted them. They show that they had their origin in the malice of a disappointed litigant, who, balked by the court in his efforts to plunder the road, and satisfy his own demands against it at the expense of other litigants having superior equities, invented these falsehoods, printed them in a circular, and procured them to be repeated in certain newspapers, either to revenge upon a judge of the court his disappointment, or, by intimidating him, still to accomplish his purposes. In both of these objects he has signally failed. A reputation which is the result of twenty years of singular devotion to the duties of a judge is not to be overthrown in an hour by falsehoods uttered by such a man, although repeated and scattered broadcast by a corrupt and venal press. Nor will such a judge be likely to swerve from his duty in consequence of such assaults, when he sees the bar and the enlightened public gathering like a wall around him, "uttering one voice of sympathy and shame."

WE HAVE spoken of the newspapers which have circulated these libels as corrupt and venal. The

Nation, of New York, which, we believe, first gave them publicity, without first ascertaining their truth, admitted into its columns a short letter of the New York counsel of the complainant in the suit in vindication of Judge Dillon, to which it added the sneering remark that the writers were too good lawyers to suppose that this was the kind of a vindication Judge Dillon needed; and since then it has preserved a selfish and dishonest silence. The Boston *Post*, which copied the article from the *Nation*, declines to print communications sent to it in refutation of the falsehoods therein contained, and these are the reasons which it gives for so declining: "We have received a communication from Mr. N. A. Cowdrey, of New York, and another from Mr. J. D. Campbell, of Davenport, Iowa, both in vindication of Judge Dillon from the charges in circulation arising from his action in the litigation pertaining to this road. We are compelled to decline their publication for the following reasons: First, for the truthfulness of the charges we did not undertake to vouch, nor did the *Nation* from which we copied; second, the length of Mr. Campbell's (34 pages foolscap) necessarily excludes it; third, both being legal arguments, based on the record, the case would require us to be furnished with the entire record and facts to enable us to determine how far the vindication is successful; fourth, it now appears that the decree ordering a sale of the road has gone into effect (Mr. Cowdrey says) which renders all further complaint of bondholders, for whom we spoke, *ex post facto;* fifth, the publication of these would open the door to counter-communications for which we have no space. As regards the whole subject, if the friends of Judge Dillon are correct in their confident opinion that no good cause of complaint existed against his administration, his reputation can not permanently suffer, and in that result none will more cordially concur than conductors of the press." When newspapers will thus open their columns to assaults upon a judge, of the truth of which they profess to know nothing, and refuse to publish statements disproving the statements thus made, the conclusion is unavoidable that they have been corrupted by money into a course so one-sided and perverse. The act passed by Congress in 1831, after the trial of the impeachment of Judge Peck, withholds, properly, no doubt, from the federal judges the power to punish constructive contempts. But the act should have made the publishing of libelous attacks upon judges, in consequence of their judicial acts, a substantive misdemeanor; and it should have been made the duty of the district attorneys to prefer bills of indictment to the grand juries in such cases. Under the operation of such a law, fairly administered, such shameful assaults upon the integrity of a judge would be impossible. If naked justice could be meted out to the editor who will open his columns to such libels, without knowing, or caring to know, whether they are true or false, and who will then refuse to open his columns to an explanation of the facts, he would have his ears cut off, be placarded "slanderer," and whipped through town at the tail of a cart.

WE INCLINE to think, however, that both Judge Dillon and his friends (including ourselves) have paid more serious attention to these charges than was justified, either from the source in which they originated or the character of the journals which have circulated them. In an address before a meeting of members of the Nebraska bar, which was held in Omaha, to consider these charges (whose resolutions we print elsewhere), Judge Wakefield said: "Two courses lay open to him (Judge Dillon) in the matter; first, for this distinguished jurist to pass them by in silence, trusting to his twenty years' record; leave them to be buried in deserved oblivion, together with the unnumbered calumnies upon great and good men in the past. The other course was to meet them and refute them. Jealous, properly, of his great reputation, Judge Dillon thought that he could not submit to the attack in silence, lest evil-minded persons should say that he was unable to answer the charges. He, therefore, made a manly and sincere statement of all the essential facts in the case; and, if it were possible (as it was not) for me to have doubted his purity and impartiality, that statement from his hand would have dispelled every doubt. He triumphantly refutes the charge even of legal error, or abuse of judicial discretion, and crushes the charge against his integrity into impalpable powder." At the same meeting Mr. A. J. Poppleton said: "These charges (if you may call them such) are mere newspaper articles; no charges are pending in any judicial tribunal or forum. I hav'nt read the charges, or Judge Dillon's reply, nor do I intend to; for if his reputation and that of the courts and judges is at the mercy of newspaper rumor, we had better abolish our courts, and quit trying to administer justice. My confidence is boundless and unabateable in Judge Dillon, and will remain so until some definite and authoritative charges, in form, are made and substantiated against him. Still, I shall vote for the resolutions. The whole thing is, however, really beneath discussion; and it is not certain that a mistake has not been made in noticing it at all." Judge Redick coincided with Mr. Poppleton's views. "If," he said, "I had control of Judge Dillon's interests, I should never have permitted him to respond to these absurd charges in any way; such is his reputation as an able and pure jurist. Knowing him as I do, I feel that fitting language is impossible to characterize this newspaper attempt to blacken his character. This man Dillon is as pure a man as God ever made. Everywhere he is respected." Judge Redick spoke especially on behalf of the bar and people of Colorado. Hon. J. C. Crawford said that none present were better able to defend Judge Dillon than he has defended himself. His career is a sufficient vindication. He felt inclined to agree with Mr. Poppleton's views. He did not know of a single person in his section who believes the charges.

MANNER AND MODE OF GIVING NOTICE OF PROTEST.

The chief considerations in connection with the manner and mode of serving notice of the dishonor of commercial paper, are, 1, the means of communication to be employed; 2, where the service shall be made; 3, whether written or verbal; 4, the form and contents of the notice.

In selecting means of communication the party giving the notice will necessarily be governed by the circumstances of each case. But in any event where such means are practicable, he may employ a private messenger to carry a written notification to the party to be charged; but where such party resides at a distance, at or near a post-town, the employment of such means of communication in preference to the mails, is, to a great degree, at the risk of the party sending the notice. Bancroft v. Hall, 1 Holt, 476. When the party to be notified of the dishonor resides or carries on business at a distance, and *at* a place where there is a post-office, the rule that notice by the post is the best mode of service, is of universal application. Shed v. Bret, 1 Pick. 401; Ludenberger v. Beall, 6 Wheat. 104; Musser v. Baldwin, 6 Hun. 916. The exceptions are quite rare, in which the courts have hesitated to apply the same rule when he resided *near* such post-town. It may be laid down, then, as a general rule, that, when the party to be notified of the non-acceptance or non-payment of a negotiable bill or note resides at or near a post-town, different from that at or near which the party giving the notice resides, the notice may be sent by mail. Benard v. Levering, 6 Wheat. 102; Cabbot Bank v. Warner, 10 Allen, 524; Shelburn Falls National Bank v. Townsley, 102 Mass. 177; Ellis v. Commercial Bank, 7 How. (Miss.) 294; Kufh v. Weston, 3 Esp. 54. In sending a notice of this sort by mail, it should be directed to the post-office nearest the residence or place of business of the party to be charged with notice, or to the office at which he usually receives his mail matter. Mercer v. Lancaster, 5 Penn. St. 160; Jones v. Lewis, 8 W. & S. 14. In the absence of any knowledge, or means of knowledge, of the office at which a party ordinarily receives his letters, the letter containing the notice should be sent to the office nearest his residence. It is not sufficient that the party to be notified was at the time the letter was addressed to him, and for considerable time before and after, sojourning at the place to which notice was sent. An indorser or drawer of a negotiable instrument will not be bound by notice of the dishonor of such paper, which was never received, merely because it was sent addressed to him at a place where he was temporarily sojourning.

In some of the states where the counties are subdivided, for purposes of local government, into *towns*, some of which contain several *villages*, and a still greater number of post-offices, one of such offices usually bears the name of the town. The rule seems to be settled by repeated decisions that, when the letter containing the notice is addressed to a party residing in such town, and is directed to the town generally, such notice is *prima facie* good, although the post-office bearing the name of the town is farthest from the residence of the party sought to be charged with notice. Cabbot Bank v. Russell, 4 Gray, 167; Downer v. Renner, 21 Wend. 10; Bank of Geneva, v. Howlett, 4 Wend. 328; Morton v. Westcott, 8 Cush. 425; Redfield, J., in Bank of Manchester v. Slason, 13 Vt. 334. It sometimes occurs that the party to whom the notice is sent resides nearest one post-office and receives the greater portion of his letters at another. In such case, notice directed to him at either, if so directed in good faith, will be well served. Ireland v. Kip, 11 Johns. R. 218; Bank of Geneva v. Howlett, 4 Wend. 323; Timms v. Delilse, 5 Blackf. 447. Where there are several post-offices from which the party receives letters, without showing any preference for either, it is quite plain that notice would be regarded as served with reasonable certainty if addressed to him at either of such offices. Bank of Utica v. Smith, 18 Johns 230; Montgomery Bank v. Marsh, 3 Seld. 481; Weekly v. Bell, 9 Watts, 273. It will be noticed that the weight of authority is decidedly opposed to a strict insistence upon the sending of the notice to the office *nearest* the residence of the party to be notified, when he is in the habit of receiving his letters at a more distant office. The absurdity of the contrary doctrine may be best illustrated by noticing two cases in which nearness to the post-office was adopted as the controlling circumstance, to the exclusion of all considerations of use.

In the case of Mechanics and Traders Bank of N. O. v. Compton, 3 Rob. (La.) 4, the notice to the indorser was directed to him at A. It was proven that there was a post-office at C, which was nearer to his residence. He received letters and papers at both places, and *had a box at the post-office of A.* The court held that the notice should have been sent to C, because it was nearer the party's residence; hence the indorser was discharged. This case was followed by that of Nicholson v. Marder, 3 Rob. 242, in which the opinion is rendered by the same judge, and the fallacy of the doctrine laid down in the precedent is made manifest by its application to the peculiar circumstances of the subsequent case. The notice was given by placing in the post-office at Natchez a letter containing it, directed to defendant at Natchez, which, the notary deposes, is, according to the best information he could obtain, the office at which defendant receives his letters and papers. He is a resident of the parish of C, in which there is no post-office. The nearest offices to his house are the one at *Natchez* and another at *Rodney*, and the difference of distance is so slight that defendant resorts to both with about equal regularity. It is difficult to determine which of the two offices is nearest defendant's house, yet this fact *must* be ascertained; and if the plaintiff has mistaken the distance by but a single rod, and sent the notice to the office located at the greatest distance, this tri-

fling error will discharge the indorser. In this important dilemma the court did not order a survey, but simply took the testimony of witnesses; and the opinion expressly declares that, though there were one or two witnesses who were of opinion that Natchez was nearer to the house of defendant than Rodney, *the greatest number of them* considered Rodney as the nearest post-office, and consequently the indorsers were discharged for want of sufficient notice. A close adherence to this narrow doctrine would render possible other decisions equally preposterous to the one last cited.

The employment of the mails is not only permitted as a means of giving notice of dishonor, in cases where the party giving the notice and the one notified reside at or near different post-towns, but is also recognized where the party to be notified resides without the city or village where the bill or note is dishonored, but so near as to resort to that place for his mail matter. In such case the notice may be inclosed in a letter addressed to the party to be charged, and deposited in the office where he is accustomed to resort for letters and papers coming through the mails. Bank of Columbia v. Lawrence, 1 Pet. 578; Bondurout v. Everett, 1 Metc. (Ky.) 658; Barret v. Evans, 28 Mo. 331; Bell v. State Bank, 7 Blackf. 456. So, also, has it been repeatedly held that, where the parties reside in the same place, and the free delivery or "penny post" system is in use, it is sufficient proof of notice to show that the letter containing the same was deposited in the post-office in time for delivery, in due course of mail, on the day following the date of dishonor. Shoemaker v. Mechanics Bank, 59 Pa. St. 79; Walters v. Brown, 15 Md. 285, and cases cited. But this rule has not been universally adopted.

Where the notice is personally served, by delivering or communicating it directly to the party to be charged, the question is beset with fewer difficulties. In such cases the only matters of inquiry are, whether it was served in time by the proper party, and whether it was sufficiently explicit to convey the necessary information. Hyslop v. Jones, 3 McLean, 96. Except where service by mail between residents of the same place is permitted on account of the free postal delivery system, or, as it is sometimes called, the "penny post," the notice in such cases is required to to be *personal*, or what is tantamount thereto. Wilcox v. McNutt, 2 How. (Miss.) 776; Bowling v. Arthur, 34 Miss. 41. In no case is service required to be strictly personal in the sense that the term is generally applied to the service of civil process. It may be by delivering the notice to the drawer or indorser in person, or by leaving the same at his place of residence or place of business. Adams v. Wright, 14 Wis. 408; Pierce v. Pender, 5 Metc. 352; Nevins v. Bank of Lansingburg, 10 Mich. 547; Smedes v. Utica Bank, 20 Johns. 371. If left at the residence, it must be before the hour of retiring. If at the place of business, the notice should be left during the usual business hours of the day, or there should be a *bona fide* attempt to leave it during such hours. The giver of the notice is not responsible for the absence of the party to be served, from his place of business. Cross v. Smith, 1 M. & S. 645; Williams v. U. S. Bank, 2 Pet. 96; Stevenson v. Blakelock, 1 M. & S. 544. This, of course, depends in a great measure upon the nature of the business and the customs of the place. In serving the notice at the place of business, it is not sufficient that it is a place where the party conducts business, but it must be *his* business in the sense that he has a proprietary interest therein; else there will be no one with whom the notice could be left except the party himself. Kleinmann v. Boernstein, 32 Mo. 311. When the notice is left at the residence of the party, it is not essential that it should be his mansion, or that he resides there with his private family, to the exclusion of other families. It would be regarded as his residence, though he be but one of a number of boarders. Bank of United States v. Hatch, 6 Pet. 250; Wharton v. Wright, 1 Carr. & Kir. 585. Neither is it necessary that it shall be his domicil in the technical sense of the term; but is sufficient if it be his actual place of abode at the time. Young v. Durgin, 15 Gray, (Mass.) 264. When the notice is strictly personal, as before observed, it is immaterial whether it be verbal or written, provided the fact can be proven. But written notice is for many obvious reasons preferable, and when served otherwise than personally, it must, of necessity, be written.

There is no prescribed form for a notice of this character; but there are certain important statements which it must contain in some form or other. These are that the note or bill was presented at maturity, payment or acceptance refused, and that the holder, or party giving the notice, looks to the party notified for payment or reimbursement. In order to communicate these facts clearly, it is often necessary, and always best, to describe with tolerable particularity the paper dishonored. But slight discrepencies in this particular, which are not misleading, will not vitiate the notice. Substantial, rather than technical accuracy is what is required. Howe v. Bradley, 19 Me. 31; Mills v. U. S. Bank, 11 Wheat. 436; Davenport v. Gilbert, 4 Bosw. 532; Bradley v. Davis, 26 Me. 45; Gates v. Beecher, 60 N. Y. 518.

W.

WE ARE INDEBTED to the kindness of Messrs. A. L. Bancroft & Co. for a pamphlet called "The California Codes, Political, Civil, Civil Procedure and Penal, with a general statement of the advantages of codification, as exemplified by practical operation of the Codes of European Nations and the United States;" by Creed Haymond, late chairman of the Code Commission.

JUDGE DILLON is not the only Federal judge who is just now being abused by the press. The other day Judge Drummond of the United States Circuit Court, sitting at Indianapolis, sentenced a number of strikers to three months in jail for contempt of court in interfering with railroads in the hands of his receivers. Whereupon the Indianapolis *Sentinel*, a nasty communistic sheet, having ascertained from a lawyer that it could not be punished for contempt for so doing, covers him all over with billingsgate.

CONTRACTS OF INFANTS.

TOBEY v. WOOD.

Supreme Judicial Court of Massachusetts, March Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT,
" AUGUSTUS L. SOULE,
" OTIS P. LORD,
} Associate Justices.

1. LIABILITY OF INFANT PARTNER—BURDEN OF PROOF.—The promise of an infant to pay checks drawn in the name of the firm of which he is a member, is voidable, and the burden of proof is upon the plaintiff to show a ratification by the defendant after he became of age.

2. RATIFICATION.—In an action against an infant upon two checks drawn by a firm of which he was a member, the facts that a portion of the goods which formed the consideration of the checks remained unsold up to the time of the dissolution of the partnership, which was seven weeks after the defendant became of age; that during the said seven weeks he drew money for his personal use, from time to time, from the firm; and that, at the dissolution, his partners agreed with him that they would answer and pay all the debts of the firm, do not constitute a ratification of his promise to pay.

Action of contract. The case (as to defendant Humes, the other defendants having been defaulted) was submitted to the superior court for the county of Suffolk, upon an agreed statement of facts, and argued at March term, 1877. After judgment for the plaintiff, the case was carried to the supreme judicial court for the commonwealth by appeal.

The facts appear sufficiently in the opinion.

MORTON, J., delivered the opinion of the court:

This is an action of contract upon two checks dated respectively Dec. 2, 1872, and Jan. 3, 1873, signed by Seth Wood & Co., and duly presented for payment and protested for non-payment. The defendant, Humes, the only one of the signers who defends the action, was a member of the firm of Seth Wood & Co., and when the checks were drawn was an infant. His promise to pay the checks, therefore, was a voidable contract, and the burden of proof is upon the plaintiff to show that Humes, after he became of age, affirmed and ratified the contract. 2 Greenleaf Ev., sec. 367, and cases cited; Reed v. Batchelder, 1 Metc. 559. Such ratification may be shown either by proof of an express promise to pay the debt, made by the infant after he became of age, which is not claimed in this case, or by proof of such acts of the infant, after he became of age, as fairly and justly lead to the inference that he intended to ratify the contract and pay the debt. Boady v. McKenney, 23 Me. 517; Proctor v. Sears, 4 Allen, 95; Thompson v. Lay, 4 Pick. 47; Pierce v. Tobey, 5 Metc. 168; Dublin & W. Ry. Co. v. Black, 16 Eng. L. & E., 558, *note*.

The plaintiffs contend that the facts in this case justify the finding that the defendant, Humes, intended to and did ratify his promise to pay these checks. These facts are, that a portion of the goods which formed the consideration of the checks remained unsold up to the time of the dissolution of the firm, which was seven weeks after Humes became of age; that during said seven weeks he drew money for his personal use, from time to time, from the firm, and that, at the dissolution, his partners, the other defendants, agreed with him that they would answer and pay all the debts of the firm. It is also agreed that at the time Humes became of age and until after the dissolution, he supposed that these checks were paid.

It has often been held that, if an infant purchases property, and after he becomes of age retains specifically the property and uses or disposes of it, it may be an affirmance of the contract by which he acquired it and deprive him of the right to avoid. Chandler v. Simmons, 97 Mass. 508, and cases cited. This is upon the ground that he can honestly retain the goods only upon the assumption that the contract by which he acquired them was valid, and therefore his retention and use of them, if unexplained, justly lead to the inference of a promise or undertaking to pay for them, after his incapacity to make contracts is removed. Todd v. Clapp, 118 Mass. 495.

But this rule can not apply in the present case, because it is not shown that Humes knew that any of the goods which were the consideration of the checks remained undisposed of at the time he became of age, and it is shown that he supposed the checks had been paid. Under these circumstances there is no foundation for an inference of a promise by him to pay the checks. Smith v. Kelly, 13 Metc. 309.

The fact that Humes remained in the firm for seven weeks after he became of age, drawing money from time to time for his personal use, and that when he retired he took an agreement from his partners that they would pay all the debts of the firm, are relied upon by the plaintiffs as showing an affirmance of the checks. But we are of opinion that these facts do not afford sufficient proof of such affirmance. In this connection it must be borne in mind that Humes supposed these checks to have been paid. In the absence of an express promise to pay, an affirmance can only be shown by unequivocal acts of the defendant, after he became capable of contracting, which show his intention to pay the debt. How far those acts of Humes might tend to show an intention on his part to ratify such debts of the firm as were within his knowledge, need not be considered. It would be forced and unreasonable to infer from them an intention and promise to pay a debt which he supposed had already been paid. Crabtree v. May, 1 B. Mour. 289; Minoch v. Hadden, 25 Mich., 304; Dunn v. Stearns, 3 Cush. 372.

It is argued that the taking an agreement of indemnity from his partners implies that he was liable for the debts of the firm, and is therefore evidence of a promise to ratify and pay such debts. This is not necessarily so. The contract of indemnity may have been necessary for his protection against debts of the firm contracted after he became of age. But if this act is to be regarded as evidence that he supposed himself liable for all the debts of the firm, it is not of itself sufficient proof of a ratification. The act relied on as a ratification of a promise made during infancy must amount to or be sufficient evidence of a promise or undertaking to pay the debt. Smith v. Kelly, 13 Metc. 309.

Perhaps, if an infant member of a firm should, after he became of age, buy out his partners, take the property of the firm and agree to pay all the debts of the firm, this might amount to a ratification of his promise to pay all the firm debts, whether known or unknown to him. It would be a clear expression of his intention and undertaking, after he became competent to bind himself, to affirm and pay such debts. But taking from his partners a promise that they will pay the debts does not imply an intention on his part to pay them. It implies that he desires and expects that they will pay the debts, and is as consistent with an intention on his part to avail himself of the defense of infancy as of the intention to waive the privilege.

Upon the whole case we are of opinion that the facts do not justify a finding that the defendant Humes, after he became of age, ratified or promised to pay the debts in suit.

Judgment for the defendant Humes.

RECOVERY BACK OF MUNICIPAL TAXES ILLEGALLY ASSESSED AND COLLECTED.

SHEA *ET AL.* v. CITY OF MEMPHIS.

Supreme Court of Tennessee, April Term, 1877.

HON. JAMES W. DEADERICK, Chief Justice.
" PETER TURNEY,
" THOS. J. FREEMAN,
" ROBERT MCFARLAND,
" J. L. T. SNEED, } Associate Justices.

1. MUNICIPAL TAXES—RECOVERY OF, WHEN ILLEGALLY EXACTED—CONFLICT OF JURISDICTION.—Municipal taxes, illegally assessed and collected, may be recovered back by the tax-payer, if the corporation has acknowledged its error, and admitted its liability to pay the same as a debt. So, a paving assessment, levied on a false and illegal theory, and the payment of which was once enforced, but afterwards admitted to be due to the tax-payer, may be recovered back by him, or off-set upon his legal assessments for the same paving, when properly assessed and corrected.

2. BUT THE STATE COURTS will not enforce such off-set against a renewed assessment for the same paving tax, which is ordered to be collected in cash by the corporation, by a mandamus from the United States circuit court; and this will be so, even though the municipal corporation be insolvent. The mandate of the United States circuit court will not be interfered with by the state courts.

DEADERICK, C. J., delivered the opinion of the court:

By an act of the legislature, passed in 1866, the City of Memphis was empowered to contract for the paving of the streets and alleys of the city with Nicolson and stone pavements, and to assess the costs thereof upon the property abutting thereon.

Under the authority of this act the city ordained, in 1867, that such of its streets and alleys as the mayor and aldermen might designate should be paved, and the costs assessed upon the property fronting thereon. The ordinance prescribes the manner in which the city may contract for the work, and how the assessments are to be collected off the property owners. A contract was made with T. E. Brown & Co. to lay down Nicolson and stone pavements upon several of the streets of the city, and, as the work progressed, bills were made out, certified to be correct by the city engineer, and delivered to the contractors, and were, by them, presented for payment to the owners of the property in front of which such work was done.

Complainants, as they allege, paid large sums upon such assessments to avoid litigation and sale of their property, the assessments having been declared, by the act and ordinance, liens upon the property assessed. Many of the citizens resisted the assessment; litigation ensued, and at April term, 1872, of this court, in the case of Brown v. Hart, it was held that such assessment was illegal, and that the act of the legislature and ordinance of the city, authorizing the same, were unconstitutional and void. Then followed the act of the legislature of March 24, 1873, empowering the City of Memphis to levy a tax, in addition to other taxes, sufficient to pay the entire costs of the pavements, and to allow those who had paid their assessments credits for the same, in the payment of said tax.

The city thereupon passed an ordinance, in 1873, authorizing the mayor to issue certificates of indebtedness to those who had made payments upon said assessments for the Nicolson and stone pavements. This ordinance made such certificates receivable at their face value and interest, in payment of any tax thereafter levied by the city, to cover the costs of said Nicolson and stone pavements. The form of the certificate is prescribed in the ordinance. It is, that "The City of Memphis is indebted to ——, or order, in the sum of ——, to bear interest at the rate of six per cent. per annum, from the —— day of —— until this certificate is redeemed." It is further stipulated that this certificate is receivable only in payment of any tax that may be levied by the City of Memphis to cover the entire cost of laying said pavements.

In the meantime Brown & Co. had brought suit in the United States Circuit Court at Memphis, against the city, upon their contract, and recovered. Upon appeal to the United States Supreme Court, the decree was modified. But it was held that the work was done under a contract with, and by the employment of, the city, and that it was liable to the contractor upon that contract. 20 Wall. 311. And the cause having been remitted to the United States Circuit Court, a mandamus was issued compelling the city to levy a tax to pay the amount of the decree.

The city, it is alleged, thereupon levied a tax of seventy cents upon the one hundred dollars, under the mandamus, to pay Brown & Co., and also a tax of the same amount to reimburse those who had paid to the contractors under the void assessment. This latter tax was payable in the city's certificates of indebtedness, issued to those who had paid the illegal assessments. The former, or "mandamus tax," to pay Brown's decree, was payable only in cash, and complainants and all others were bound by the ordinance to pay it in cash. These taxes were imposed for the year 1873, and an additional "mandamus tax" of thirty cents on the one hundred dollars' worth of property was levied for the year 1874. Thus, for those two years, according to the terms of the ordinance levying the "mandamus tax," a large additional tax, payable in cash, was imposed upon complainants, notwithstanding they held the evidence of the city's indebtedness to them, in an amount greatly exceeding the amounts of their taxes of both kinds; and this indebtedness having arisen from payments made by them in the extinguishment, *pro tanto*, of the debt of the city to Brown & Co., for the payment of the balance of which the "mandamus tax" was imposed. The tax collector, it is alleged, refused to receive the certificates of indebtedness, which were tendered in payment of the "mandamus tax."

The bill further alleges that the city is insolvent, and that the power to levy the reimbursing tax has been repealed by the act of 1875; and that said city is about to levy additional "mandamus tax" upon complainants. The bill prays that the city be enjoined from further claim for paving tax, off complainants, until the other taxpayers have paid their proportion of the same.

The city demurred to the bill, the demurrer was overruled, and the city has appealed to this court.

It is here insisted for the city that the complainants, upon the facts stated, can not maintain an action against the city to recover the assessments paid by them, and are not entitled to any relief; that although the city was the contracting party for the taxpayers, the latter had voluntarily paid the assessments, and had thereby ratified and adopted the acts of the city, performed by it as the agent of the parties assessed; that taxes illegally assessed and collected can not be recovered back, there being no fraud nor mistake of fact, although the payor is mistaken as to his legal liability.

Mr. Cooley, in his recent work on Taxation, at page 566, says: "That a tax, voluntarily paid, can not be recovered back, has been held by the authorities with very few exceptions. It is immaterial, in such a case, that the tax has been illegally laid, or even that the law under which it was laid was unconstitutional." And he cites numerous cases to support the doctrine announced in the text. The rule is laid down to the same effect in Dillon on Mun. Corp., sec. 751 and notes.

And while it is true that threats of litigation, or apprehension of the levy of distress warrants on property, by the weight of authority would not make a payment of taxes, under such threats or apprehension, compulsory, yet where taxes have been wrongfully exacted by the state, or by a city, they may and ought to be refunded.

It is very ingeniously argued for the city, that, in the contract for paving, the city contracted as agent of the taxpayers, and that, by the terms of the contract, the parties assessed were primarily liable to the contractors, and the city was merely the guarantor for their performance. This construction of the contract, though plausible as to some of its expressions, is inconsistent with its obvious purposes and meaning.

As held in 20 Wallace, the city was in fact the contracting party, and stipulated in the contract to have the taxpayers pay directly to the contractors; thus providing for making the payment without the employment of other agencies. But the fund to be provided for the payments was to be raised by assessments upon the property-holders, by the direct exercise of the taxing power of the city. The city, in fact, made the contract for the work, levied the taxes for its payment, and provided simple and effectual agencies for its collection. The tax having been wrongfully and illegally imposed, collected and applied to the benefit of the city, in the discharge of its indebtedness, it was right and lawful for the city to provide for the indemnity of those from whom it had been wrongfully and illegally exacted. Cooley on Taxation, 530.

This was done by the ordinance already referred to, pursuant to the act of March 24, 1873, by which the mayor was authorized and required to issue certificates of indebtedness to all persons who had paid the illegal assessments, for the amount thereof, thus not only acknowledging their liability to repay the amounts so illegally exacted, but foreshadowing a mode, afterwards adopted, by which the same were to be paid. The city thus became bound by its solemn and deliberate recognition of this indebtedness, and its promise to pay it. And the recognition and promise inure to the benefit, not only of those who procured certificates of indebtedness, but equally to all others who paid the assessments. The money, having been paid for the benefit of the city, constitutes a debt upon it.

In the case of Nelson v. The Town of Milford, an illegal tax had been levied and collected by the assessors, and they, to prevent actions against them by persons whose property had been distrained, refunded the tax so collected; and the town authorities directed that the sums paid back by the assessors should be refunded. Subsequently this order to pay the assessors was rescinded. But it was held that the vote to refund to the assessors the amounts refunded by them to the taxpayers was a promise founded upon a valid consideration, and could not be rescinded by a subsequent vote. 7 Pickering, 18.

While, therefore, we are of opinion that the taxes of 1873 and 1874, which were levied to reimburse those who had paid the pavement assessments, may be paid by the city's certificates, and by its indebtedness for such payments, we can not interfere with the special mandamus tax levied under the mandate of the United States Circuit Court to pay Brown's debt. To do so would have the effect, practically, to defeat the execution of the order of that court, by diverting the means intended to pay Brown's debt to other purposes.

But we hold that complainants are entitled to an account to ascertain the amount due them from the city, and to have a decree for such sums as may be ascertained to be due them. The Chancellor's decree overruling the demurrer will be affirmed, and the cause will be remanded for answer, and for further proceedings in conformity to the principles of this opinion. The costs of this court will be paid by the city.

FIRE INSURANCE — LEGAL REPRESENTATIVES—ALIENATION—WAIVER.

GEORGIA HOME INSURANCE COMPANY v. KINNIER'S ADMINISTRATRIX.

Supreme Court of Appeals of Virginia, January, 1877.

1. LEGAL REPRESENTATIVES—DESCENT.—A policy of fire insurance, though payable to the "legal representatives" of the insured, does not, upon his decease, descend to his heirs, but passes to his personal representatives.

2. ALIENATION—JUDICIAL SALE.—A judicial sale of the property insured, without confirmation, does not amount to an alienation within the meaning of the policy, nor to "the foreclosure of a mortgage," though it be a sale under a creditor's bill to pay the debts of the insured.

3. CONSTRUCTION—AMBIGUITY.—The maxim that "the words of an instrument shall be taken most strongly against the party employing them," applies with peculiar force in the construction of a policy of insurance which is wholly the work of the underwriter; and conditions and provisos, especially when ambiguous, equivocal or inconsistent, should be strictly construed against the insurer and liberally in favor of the insured.

4. WAIVER OF CONDITIONS—ESTOPPEL.—A condition in a policy of fire insurance that if the risk be increased by a change of occupation or other means within the control of the assured, without the written consent of the insurers, "the policy shall be void," being inserted for the benefit of the insurers, they may dispense with a compliance therewith or waive a forfeiture of the policy incurred by a breach thereof, and thereby become estopped from setting up such condition or breach in an action for a loss subsequently occurring.

5. NEED NOT BE IN WRITING.—And such waiver of the forfeiture arising from the breach of the condition need not be in writing, but may be by parol, at least in a case where the policy is not attested by the corporate seal of the company, and is hence not a specialty.

6. WHAT WILL AMOUNT TO A WAIVER.—Any acts, declarations, or course of dealing by the insurers, with knowledge of the facts concerning a breach of a condition in the policy, recognizing and treating the policy as still in force, and leading the assured to regard himself as still protected thereby, will amount to a waiver of the forfeiture by reason of such breach, and estop the company from setting up the same as a defense, when sued for a subsequent loss.

7. NEW CONSIDERATION.—A waiver of conditions, or forfeiture arising from a breach thereof, need not be founded on any new consideration.

8. POWER OF AGENT.—A local agent of a foreign insurance company, clothed with authority to effect contracts of insurance, to fix rates of premium, to give consent to increase of risks and change of occupation of building insured, to cancel policies on account of increase of risk, and exercise supervision over the property covered by policies issued at his agency, has power to dispense with conditions and waive forfeitures arising from a breach thereof, in the absence of any limitation upon his authority known to the assured.

9. INCIDENTAL POWERS.—The foregoing powers are necessary incidents of the general authority of the agent to effect contracts of insurance, conduct the business at his agency, and do all things necessary and proper in the prosecution thereof.

10. EXTENT OF WAIVER.—A waiver of a forfeiture resulting from a breach occasioned by a change in the occupancy of the building, increasing the risk, extends not only to breaches occasioned by the occupancy before such waiver, but to those resulting from a continuation of such occupancy.

11. COURT AND JURY.—Whether the facts and circumstances which constitute a forfeiture are proved is a ques-

tion for the jury. Whether, when proved, they amount to forfeiture, is matter of law for the court.

BURKS, J., delivered the opinion of the court:

This is a *supersedeas* allowed by one of the judges of this court to a judgment rendered by the corporation court for the city of Lynchburg, in behalf of Bettie J. Kinnier, administratrix of Alexander Kinnier (defendant in error), against the plaintiff in error—The Georgia Home Insurance Company, a corporation created by the state of Georgia.

The action was *assumpsit* on a policy issued by the plaintiff in error, insuring the said Alexander Kinnier, and his "legal representatives," to the amount of $2,000, against loss by fire on a dwelling house, situate on Daniel's Hill, in the city of Lynchburg, and to the amount of $1,000 against like loss on household furniture, and other personal property contained in said building. The plaintiff, in her declaration, alleged the destruction of the building by fire, and claimed the amount of the insurance upon it. The defendant demurred to the declaration, and also pleaded the general issue. The demurrer was overruled, and, on the trial of the issue by the jury, the plaintiff and defendant both moved for instructions.

The first instruction asked for by the defendant was refused by the court, and a bill of exceptions was taken to the refusal. This is bill "No. 1" in the record.

The defendant then asked for eight other instructions. The court refused to give the fifth, sixth and seventh, and also refused to give the first, second, third, fourth and eighth in the form in which they were asked, but gave them with modifications of each, and also gave three asked for by the counsel for the plaintiff. To this ruling of the court the defendant's counsel excepted and the instructions refused, and as given with modifications are found in the bill of exceptions "No. 2." By this bill all the evidence of both parties is made a part of the record.

The jury found a verdict for the plaintiff for $2,000, with interest from the 1st day of April, 1871. The defendant thereupon moved for a new trial, upon the ground that the verdict was contrary to law and the evidence. The motion was overruled, and a bill of exceptions, "No. 3," was taken, in which the facts were certified.

The first assignment of error is to the judgment of the court overruling the demurrer, and this may be most conveniently disposed of in this connection. The first, and, I suppose, the chief objection made to the declaration is, that the action was improperly brought by the administratrix, and could only be maintained by and in the name of the *heirs* of the plaintiff's intestate.

The declaration alleges that "the defendants entered into and duly executed a certain writing, commonly called a policy of insurance, and delivered the same to the plaintiff, wherein and whereby, in consideration of the receipt of thirty-seven dollars and fifty cents paid by the plaintiff to the defendants, the said Georgia Home Insurance Company did insure the said Alexander Kinnier and his *legal representatives* three thousand dollars," etc. It is contended that, by the terms "legal representatives," used in the declaration pursuing the tenor of the policy, the *heirs* at law of Alexander Kinnier were intended, so far as the insured building is concerned. I do not think this is the proper construction of the policy. The policy declared upon, and as set out, is a contract to indemnify Alexander Kinnier personally. The words "legal representatives," as used, are of the same import as the words *executors, administrators, personal representatives.* The policy as set out is a simple contract, and upon the death of Alexander Kinnier, passed, like his bonds, notes and other choses in action, to his administratrix, and she only had a right of action upon it.

We have been referred by the counsel for the plaintiff in error, in support of his objection, to the case of Haxall v. Shippen, 10 Leigh, 536. That case involved incidentally the construction of a *covenant* for insurance entered into by the Mutual Assurance Society, a corporation created by the laws of this state. The covenant, in terms, stipulated for payment, in case of loss, to the assured, "his *heirs* and assigns," and it was construed in a *chancery* suit in which the *form* of proceeding was not made a question, as a covenant *real*, which enured to the benefit of the *heir*. Whatever may have been the proper construction of the covenant in that case, I do not think the policy in this case can be properly construed as intended to enure to the benefit of the *heirs*. However that may be, the statute (Code of 1873, ch. 126, § 19), it seems, would give the administratrix the right to maintain this action.

The second objection seems to be based upon a misconception. The declaration substantially alleges a contract made and entered into by the defendant with the plaintiff's intestate, the consideration of which (the premium) is stated to have been paid by the plaintiff, and, by fair intendment, to have been paid by her in her representative capacity.

The remaining objections, the one specially set out in the demurrer and the other assigned as error in the petition, seem to be merely formal and do not require any special notice.

I am of opinion there was no error in overruling the demurrer.

The policy in this case, as is usual in such writings, contains a multitude of conditions, exceptions, limitations and restrictions, amongst which are the following, which I number for convenient reference:

1. * * * "The company is not liable * * * for loss, if there is other prior or subsequent insurance, without written consent of this company;

2. "And if the title of the property is transferred or changed, or the policy is assigned without written permission hereon, the policy shall be void;

3. "And the entry of a foreclosure of a mortgage, or the levy of an execution, shall be deemed an alienation of the property, and this company shall not be holden for loss or damage thereafter.

4. * * * "This policy shall be vitiated * * * if the premises hereby insured become vacated by the removal of the owner or occupant for a period of more than twenty days, without immediate notice to the company and written consent.

5. "Any change within control of the assured, material to the risk, shall avoid this policy.

6. "All persons having a claim under this policy, shall give immediate notice of the same, and within thirty days render a particular account thereof, with an affidavit stating time, circumstances, and cause of fire, the whole value and ownership of the property assured, the amount of the loss or damage, other insurance, if any, and copies of the written portion of all policies; if required, shall produce books of account and other proper vouchers, and be examined under oath touching all questions relating to the claims, and subscribe such an examination when reduced to writing; and a refusal to answer any such questions shall cause a forfeiture of all claims by the parties; and, until sixty days after such proofs are rendered, the loss shall not be payable. * * *

7. "This policy shall not be valid until the premium has been paid to, and the policy countersigned by the duly authorized agent at Lynchburg, Va."

The policy was signed by the president and secretary of the company, and under their signatures was the

following: "Countersigned at Lynchburg, Va., this, the 12th March, A. D. 1870. T. H. IVEY, Agent."

The defense of the company before the jury consisted in an effort to defeat the recovery sought by the plaintiff, by attempting to prove a violation or breach by the plaintiff of the several conditions and stipulations above set forth and enumerated.

It appears from the evidence that the policy was issued on the 12th day of March, 1870, through T. H. Ivey, the agent at Lynchburg, and the risk, as provided by the policy, was to commence on the 13th day of March, 1870, at 12 o'clock, noon, and end on the 13th day of March, 1871, at 12 o'clock, noon. It was not, however, delivered on the day of its date, nor, indeed, was it ever delivered to Alexander Kinnier, the insured, bnt was retained by Ivey, the agent, in his possession for more than two months after it was executed. Nor did Kinnier pay the premium for the insurance. Ivey says that at the time when the policy was executed, Kinnier told him that he did not have the money with which to pay the premium, and that he (Ivey) told Kinnier it made no difference, that at the end of the month he would settle with the company. Kinnier died on the 1st day of April following.

Mrs. Kinnier, the wife of the decedent (the defendant in error), became his administratrix, and made sale of the personal effects of her intestate, including the personal property insured, on the 19th day of May. On the 30th day of the same month (May) J. N. Gordon, the agent of the administratrix, paid the premium on the policy to Ivey, took Ivey's receipt for it, and Ivey at the same time delivered the policy to Gordon, having previously threatened Gordon with a cancellation of the policy if the premium were not paid. On the day of the sale of the personal property, Mrs. Kinnier (the administratrix), who, with her family, had occupied the insured tenement from the time of her husband's death until that day, vacated it, leaving no occupant; nor was it ever occupied at any time thereafter. Tom Watson (a colored man), as a tenant, occupied the kitchen, an out-building on the same lot on which the insured tenement stood, and within fifteen or twenty feet of it; and the evidence tended to show that Watson was charged with the care of the insured building, and continued in charge of it until the 2d day of November following (1870), when it was wholly destroyed by fire in the night time, and, as supposed, by an incendiary.

Soon after the sale before mentioned, to wit, in the month of June, the creditors of the decedent (Kinnier) filed a bill in the Corporation Court of Lynchburg against the widow and heirs of said decedent for a sale of his real estate and payment of their debts out of the proceeds. A decree was accordingly made for the sale, on credit, of said real estate, including the lot on which the insured building was situate. The decree in express terms provided that the commissioner ordered to make the sale should, at the time of the sale, publicly announce "that no sale under the decree should be valid until ratified by the court." The sale, as ordered, was made on the 8th day of July following, and A. R. Woodroof became the purchaser of the lot on which the insured building stood. The sale was reported to the court, and the commissioner, in his report, stated that the public announcement required by the decree was made at the time of the sale. Exceptions were filed to the report and sale by some of the parties in interest (not the purchaser), on account of alleged inadequacy of price, which exceptions were afterwards sustained by the court, and the sale was vacated. Woodroof (the purchaser) was never let into possession of the premises. After the purchase, however, he took out a policy of insurance in the "Liverpool, London and Globe Insurance Company," on the dwelling-house, the same on which the policy, which is the foundation of this suit, had been issued.

The policy issued to Woodroof was upon condition that it should be cancelled if the court did not confirm the sale which had been made to him.

The evidence proved that T. H. Ivey was the agent of the company, and tended to show that he was a general agent with power to receive and accept proposals for risks, subject to the approval and ratification of his principal; to issue and deliver policies, and renew and cancel the same, and that he was supplied with blanks for proofs of loss. It further tended to show that he was present when the personal property insured was sold by the administratrix, knew that the insured building had been vacated, and that it was expected to be sold; that he had this knowledge when, on the 30th day of May, he collected the premium from the agent of the administratrix and delivered the policy to him; and the agent of the administratrix testified that, at the time the premium was paid and the policy delivered, he inquired of Mr. Ivey "if the policy was all right, and, if the house was burned, would the money be paid?" to which Ivey replied: "It was all right, and the money would be paid;" and that, at the same time, when told by the agent aforesaid that Mrs. Kinnier had gone away, that the family had broken up, the personalty had been sold and the real estate would be sold, and that a servant was on the premises, in charge, and was asked by said agent whether it would be all right, Ivey replied, that "it would."

It further appears by the evidence, that immediately after the house was burned, the company's agent (Ivey) of his own accord, sent a notice of the loss to the company, and the agent of the administratrix testified that soon after the fire he applied to Ivey to furnish him with blank forms for proofs of loss, and inquired of him whether lapse of time would make any difference, and Ivey replied, that "it would not;" and that after he procured the blanks, to-wit, about the 1st day of February, 1871, they were filled up and delivered to Ivey, and Ivey testified that he sent them to the company. It does not appear that the company ever made any objection as to the proofs of loss, or as to the time in which they were furnished.

It further appears by the testimony of the agent of the administratrix, that he repeatedly wrote to the agent of the company, asserting claim for loss under the policy, and could get no satisfactory response, until, finally, on the 13th of May, 1871, he received a letter from one of the agents, stating that the claim had been maturely considered by the company, and that they did not regard themselves as liable either legally or equitably. Ivey was examined as a witness in behalf of the company, and there was considerable conflict between his testimony and that of Gordon (the agent of the administratrix), who was also examined as a witness, especially in regard to the vacating of the building. Ivey's knowledge of that fact, at the time he received the premium and delivered the policy, and also in regard to the proofs of loss and the furnishing of the blank forms for such proofs.

There was other evidence in the case, but so much only is stated and its tendency towards the proof of material facts, as is deemed necessary for the proper consideration and determination of the questions of law arising upon the instructions.

The instruments and the rulings of the court thereon are shown by the bills of exceptions, No. 1 and No. before referred to, and are as follows:

No. 1—Memorandum: That, on the trial of this cause, after all the evidence on either side had been adduced and examined, the defendants, by counsel, moved the court to exclude from the jury, and instruct them not to consider any evidence going to show a loss by fire,

consuming the two-story framed and shingled building, with brick basement fully detached, occupied in his lifetime "by Alexander Kinnier as a family residence, situate on Daniel's Hill, near the city of Lynchburg, Va., the same having descended to the heirs at law of Alexander Kinnier, at his death and before the happening of said fire; which motion the court overruled, and refused to exclude said evidence, or instruct the jury not to consider it.

No. 2.—The defendant moved to instruct the jury as follows: 1. That if the jury believed from the evidence that, after said policy was issued, any change within the control of the parties interested, or those representing them, material to the risk, occurred to the property to be insured against in the policy, then the policy became void, and no recovery can now be had thereon. Which instruction the court gave with this modification: that the change must have been such a one as affected the condition of the property itself, and that made by the act, authority, consent, procurement or connivance of the assured, and not the mere vacation of the house by the assured or its occupants.

2. That if the jury believe from the evidence that, after the risk of the policy sued on was assumed by the defendants, the premises thereby insured became vacant by the removal of the owner or occupant for a period of more than twenty days, without notice to the company, and their consent thereto in writing, the said policy was thereby avoided, and no recovery can be had thereon in this suit. Which instruction the court gave, but with this modification: That if the insurers, or their lawful agent, knew of said vacation and did not then avoid it, but treated it as a still existing policy, by delivering the same, and receiving the premium for the whole unexpired term, it was a waiver of the right to avoid it for that cause, and is no bar to a recovery in this action.

3. That if the jury believe from the evidence that, after the risk was assumed by the defendants, the title to the property insured was transferred or changed without the permission of the defendants written on said policy, then said policy was thereby avoided, and no recovery thereon can be had in this suit. Which instruction the court gave, but with this modification: That if the change be a mere succession of the widow and heirs of the assured, who resided in the house insured at the time of his death, this was not such a change or transfer of title as avoided the policy.

4. That if the jury believed from the evidence that the plaintiff failed, for more than thirty days after the loss occurred, to render the defendants a particular account thereof, with an affidavit, stating time, circumstances and cause of fire, the whole value and ownership of the property assured, amount, the amount of loss or damage, etc., then she failed to comply with the requirements of said policy, and can not recover in this action. Which instruction the court gave, but with this modification: That if the jury believe from the evidence that the insurers, from any reliable source, knew that the building insured had been destroyed by fire, and by any act or declaration of theirs, or their lawful agent, prevented the assured from preparing the schedule, with the affidavit thereto, required by the policy, within thirty days next succeeding the burning of the house, whether verbally or in writing, it was a waiver of the performance within the thirty days of that condition, and the omission to do so is no bar to this action, provided it was done within reasonable time thereafter.

5. That the plaintiff can not recover in this suit unless she proves that at the time of the loss by fire the property consumed was vested in or belonged, legally or equitably, to her, as administratrix of Alexander Kinnier, deceased. Which instructions the court refused to give.

6. That if the jury believe from the evidence that there was, on the part of the insured, or those claiming under him, such a violation of the conditions and requirements of the policy in controversy as to work a forfeiture thereof, they must find for the defendant; notwithstanding that they believe that T. H. Ivey, the agent of the defendant at Lynchburg, did undertake and agree on behalf of the defendant, by an oral contract, to waive, in favor of the insured, or those claiming under him, the obligation of such condition and requirements, or any forfeiture which at the time of such undertaking or agreement may have occurred thereunder. Which instructions the court refused to give.

7. That if the jury believe from the evidence that, after the death of the intestate, Alexander Kinnier—a suit having been regularly instituted by his creditors, for the purpose of subjecting the premises insured to the payment of his debts, and the court in which said cause was instituted, having, on the 15th day of June, 1870, ordered said premises to be sold by its commissioner, and said commissioner having, on the 8th of July, 1870, made such sale, those facts effected such a change in the title to the property insured under the provisions of the policy sued on as rendered the same void, and the defendants can not be held responsible for any loss which thereafter occurred. Which instruction the court refused to give. The plaintiff, by counsel, then moved the court to instruct the jury as follows:

1. That if they believed from the evidence that, at the time of issuing the policy in the declaration mentioned, the witness, T. H. Ivey, had been authorized by the defendant to receive and accept proposals for risks, subject to their approval and ratification, to issue and deliver policies and renew the same, and receive the premiums therefor, and had been supplied with blanks, signed by the president, to be filled up and countersigned by him, this constituted him the general agent of the company, and the company is bound by all his acts, as such, within the scope of his authority, so long as it existed, notwithstanding any private instructions which he may have received limiting that authority, of which the plaintiff had no notice. Which the court gave.

2. That the company is bound by all the acts and declarations of its agent which were within the general scope of his authority, and made while in the execution of his agency; notwithstanding that in such acts and declarations he may have departed from his instructions received from the company, provided that the assured had no knowledge of such instructions. Which the court gave.

3. That the conditions of the policy, that the policy should be avoided by the removal of the owner or occupant, for a period of more than twenty days, without immediate notice and written consent, was inserted by the company itself for its own protection and benefit; and that it was competent for the company, or its agent, to waive the said condition, either orally or in writing, notwithstanding the expression used as to its written consent. Which instruction the court gave.

After the foregoing instructions, as asked for by both defendant and plaintiff, and rejected, modified, or given as above stated, the defendant, by counsel, moved the court to give the jury, as a modification of the defendant's second instruction, as modified by the court, the following instruction:

8. But if the jury believe from the evidence that the defendant's agent delivered said policy on the statement of the plaintiff's agent, that the insured

premises were in the occupation of a colored man, but that in fact the house insured was not then or afterwards thus occupied, but was then and remained vacant, then such delivery of the policy and collection of the premium was no waiver of the said condition in said policy, and the words, "premises hereby insured," used in said policy, refer to the building thereby insured, and the occupancy of a colored man of an out-house fully detached was no such occupation of the "premises insured" as said policy required.

The court refused to give said instruction, on the ground that, at the time of the delivery of said policy, and the receipt of the premium by the agent of the company, there is not a particle of proof before the jury that any statement of such kind was made by the plaintiff's agent; and in lieu of said instruction the court gave the following:

That if the jury believe from the evidence that after the risk of the policy sued on was assumed by the defendants, the premises thereby insured became vacant by the removal of the owner or occupant for a period of more than twenty days without notice to the company, and their consent thereto in writing, then said policy was thereby avoided, and no recovery can be had thereon in this suit, unless they believe from the evidence that the defendants or their lawful agent knew of said vacation and did not avoid it, but treated it as a still existing policy by receiving the premium for the whole term and delivering the policy, which would be a waiver of the right to avoid the policy, and is no bar to a recovery in this action.

The court further instructed the jury that the words in the policy, "the premises hereby insured," are to be interpreted as having reference exclusively to the dwelling-house insured; and although the jury should believe from the evidence that an out-house was occupied by a colored man at the time mentioned, it was not such an occupation of the house insured as contemplated in the policy.

To all which opinions and judgments of the court, refusing to give said first, second, third and fourth instructions asked by the defendant, except with the modifications thereof by the court, the said modifications as made, and the refusal to give the fifth, sixth, seventh and eighth instructions moved by the defendant's counsel, and giving the instructions in lieu of the eighth, and also giving the first, second and third instructions moved by plaintiff's counsel, the defendant, by counsel, except, and pray their exceptions to be signed, sealed and enrolled, according to law; which is accordingly done.

The instruction set out in bill "No. 1," and the fifth in the series of "No. 2," may be considered together. They propound as law to the jury, that, the title to the property insured being vested in the *heirs* of the plaintiff's intestate, the plaintiff, as administratrix, could not recover on the policy. This is substantially the same proposition presented by the demurrer to the declaration, and, as we have seen that the demurrer was properly overruled for the same reason, these two instructions were properly refused.

The other instructions asked for by the defendant relate to the conditions in the policy hereinbefore recited. Upon examination, it will be seen that these conditions and stipulations are wholly for the benefit of the insurer, stringent in their character, some of them more or less ambiguous and equivocal in their terms, and the breach of each is visited with a forfeiture. They are annexed, however, to the policy, constitute a part of the contract, and, however rigorous, are binding on the parties, unless in some way dispensed with. They should be fairly construed according to the rules applicable to such instruments. The maxim, that "the words of an instrument shall be taken most strongly against the party employing them," is peculiarly appropriate in the construction of a policy of insurance, and especially of such conditions as we are now considering. The instrument is wholly the work of the underwriter, and is usually filled with a multitude and variety of stipulations seldom read by the assured when he accepts the policy, and if read, rarely, if ever, fully understood. Abounding in forfeitures, and in provisions generally harsh and difficult of performance, it should be strictly construed against the insurers and liberally in favor of the insured. A modern writer on insurance thus states the rule: "No rule, in the interpretation of a policy, is more fully established, or more imperative and controlling, than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to indemnity, which in making the insurance it was his object to secure." May on Insurance, 182.

Bearing in mind these salutary rules, let us proceed with the examination of the instructions embodied in the second bill of exceptions.

The first in the series evidently points to the condition or stipulation before noted as five. "Any *change*, within control of the assured, material to the risk, shall avoid this policy." The court refused to give this instruction as asked, and gave it with a construction of the word "change," limiting the meaning to a change which affects the condition of the property wrought by the agent of the assured, and excluding the idea that it embraced the mere vacation of the building by the assured or the occupant. I think this explanation was proper to prevent the jury from being misled. The word "change" is certainly a very comprehensive term. In the sentence in which it occurs, considered without reference to other clauses, it might include any change in the title, possession, or condition of the property. But we must look to the whole instrument, and so construe it as to give effect, if possible, to each and every part of it, and ascertain what limitation, if any, should be placed upon the meaning of this very comprehensive term—"change."

Was it used in reference to the title? Plainly not; for, a change of title is clearly and distinctly provided against by conditions two and three. Did it refer to a change of possession from the assured to some other person? I think not: for condition four implies authorized occupancy other than by the owner.

Did it refer to the vacating of the premises? It could not be; for that change is expressly provided against by condition four. It must, therefore, as it seems to me, be taken to refer solely to some such change in the *condition* of the building, as is declared in the modification made by the court. At all events, it could not have been intended to include the vacating of the building; and it is apparant that the sole object of the modification was to guard the jury against a construction which would include the vacating of the building; and, although the construction given by the court may possibly be somewhat too narrow, yet, under the evidence, it could not have misled the jury, and was not to the prejudice of the defendant.

I do not think there was any error in refusing the instruction as asked, and giving it as modified.

The second instruction is based on condition four, which vitiates the policy if the insured building should be vacated by the removal of the owner or occupant for more than twenty days, without immediate notice and written consent.

The instruction was given with modifications. As given, in substance, it declares as law, that it was competent for the insurer or his lawful agent to waive condition four, and, if at the time the agent of the company received the premium of insurance and de-

livered the policy, he had knowledge of the vacation of the property, and did not then avoid the policy, but treated it as valid and subsisting, such conduct of the agent was a waiver of the condition, and a breach of it could not be relied on by the defendant to defeat the plaintiff's recovery.

As before stated, there was abundant evidence before the jury tending to show that Ivey (the company's agent), at the time he collected the premium and delivered the policy, had the knowledge on which the modified instruction was founded, and then represented to the plaintiff's agent (Gordon) that the policy was all right, and that the money assured would be paid if the house should be burned, and furthermore, threatened to cancel the policy if the premium were not paid. Gordon must have relied upon these acts and declarations of Ivey, and was induced thereby to pay, and did pay the premium and accept the policy. There was evidence to show that both agents knew that the house had been left vacant, and would not be again occupied by Kinnier's widow, or by any of his family; for the family had dispersed, and all the circumstances go to show that it was not intended that the condition against removal should be enforced. If such had not been the intention and understanding of the parties, it is safe to conclude that the premium would not have been paid, nor the policy delivered.

Now, this conduct of the company's agent, which the evidence strongly tended to prove—his acts and declarations—amounted, if proved, (and whether proved was a question left to the jury), to a dispensing with the performance of the condition by the assured, or a waiver of the forfeiture incurred by the breach of it, or they operated as an estoppel, precluding the company from afterwards relying upon the breach as a bar to the claim of the assured for indemnity under the policy. Such waiver or estoppel (for the terms "waiver" and "estoppel" may be indifferently used in application to the subject we are now considering), may take place either pending the negotiation for the policy, or after such negotiation has been completed, and during the currency of the policy, and either before or after forfeiture incurred. Such waiver may be made by a general agent, acting within the scope of his powers, needs no consideration to support it, and may be by parol, although the written consent of the insurer is required by the terms of the policy. Nor will the party insured be bound, nor ought he to be bound, by any instructions given by the insurer to his agent limiting the general powers possessed by the latter in relation to the subject of the agency, unless such instructions are made known to the assured. May on Insurance, 611, 618, 622; Coursin v. The Penn. Ins. Co., 46 Penn. St. 323; Peoria Marine and Fire Insurance Co. v. Hall, 12 Mich. 203; Heaton v. Manhattan Fire Insurance Co., 7 R. I. 502; Viele v. Germania Insurance Co., 26 Iowa, 9.

The case last cited (26 Iowa, 9) seems to meet every objection as to matters of waiver and estoppel made by the plaintiff in error. It seems to have been elaborately argued by the counsel on both sides, and to have been thoroughly investigated and well considered by the Supreme Court of Iowa, in which the Hon. John F. Dillon, an eminent jurist, presided as chief justice. The reporter, in a note appended, calls attention to the importance and somewhat leading character of the case, and the interesting nature of the questions discussed.

The following propositions, amongst others, supported by numerous authorities, some of them English, but mostly American, seem to be established by that case:

1. WAIVER OF CONDITIONS—ESTOPPEL.—A condition in a policy of fire insurance that, if the risk be increased by a change of occupation, or other means within the control of the assured, without the written consent of the insurers, "the policy shall be void," being inserted for the benefit of the insurers, they may dispense with a compliance therewith, or waive a forfeiture of the policy incurred by a breach thereof, and thereby become estopped from setting up such condition, or a breach, in an action for a loss subsequently occurring.

2. WAIVER NEED NOT BE IN WRITING.—And such waiver of the forfeiture arising from the breach of the condition need not be in writing, but may be by parol, at least in a case where the policy is not attested by the corporate seal of the company, and is hence not a specialty.

3. WHAT WILL AMOUNT TO A WAIVER.—Any acts, declarations or course of dealing by the insurers, with knowledge of the facts constituting a breach of a condition in the policy, recognizing and treating the policy as still in force, and leading the assured to regard himself as still protected thereby, will amount to a waiver of the forefeiture by reason of such breach, and estop the company from setting up the same as a defense when sued for a subsequent loss.

4. NEED NOT BE FOUNDED ON NEW CONSIDERATION.—A waiver of conditions, or forfeiture arising from a breach thereof, need not be founded on any new consideration.

5. POWER OF AGENT TO WAIVE FORFEITURE.—A local agent of a foreign insurance company, clothed with authority to effect contracts of insurance, to fix rates of premium, to give consent to the increase of risks and change of occupation of buildings insured, to cancel policies on account of increase of risk, and exercise supervision over the property covered by policies issued at his agency, has power to dispense with conditions and waive forfeitures arising from a breach thereof, in the absence of any limitation upon his authority known to the assured.

6. IMPLIED AND INCIDENTAL POWERS.—The foregoing powers are necessary incidents of the general authority of the agent to effect contracts of insurance, conduct the business at his agency, and do all things necessary and proper in the prosecution thereof.

7. EXTENT OF WAIVER.—A waiver of a forfeiture resulting from a breach occasioned by a change in the occupancy of the building, increasing the risk, extends not only to breaches occasioned by the occupancy before such waiver, but to those resulting from a continuation of such occupancy.

I see no error in the refusal to give the instruction as asked, and giving it in the modified form.

The third instruction relates to condition 2. The court gave it with the construction that the change interdicted by the condition was not intended to include devolution of title upon the heirs by death of the assured. In this, surely, there was no error. By the change of title provided against in the condition must have been intended a voluntary disposition or alienation of the property. It could not have been intended to embrace all kinds of transfer of title; for, in condition 3, change of title by "foreclosure of mortgage or levy of execution" is specially provided against. It is there declared that such a change shall be "*deemed* an alienation" that is, by fair construction, an alienation within the operation of condition 2. Condition 3 must, therefore, be taken to be intended as supplemental to condition 2. Moreover, it is, to the last degree, unreasonable to suppose that any sane man would ever accept a policy of insurance against loss by fire, if he understood it, which contained a provision for *immediate forfeiture* by reason of his death and consequent descent of title to his heirs. Burbank v. Rockingham Mut. Fire Ins. Co., 4 Fos. (N. H.) 550.

The fourth instruction refers to condition 6, in regard to the preliminary proofs of loss to be furnished to the company. The evidence showed that such proofs were furnished, although not within the thirty days from the time of loss. Gordon, the agent of the administratrix, after repeated applications, finally succeeded in getting the requisite blank forms for the proofs, which he filled up and delivered to Ivey, and the latter says he sent them to the company. No complaint was ever made by the company as to the regularity or sufficiency of the proofs, or as to the time within which they were furnished. Moreover, there was evidence tending to show that Gordon was preven ed from sending the proofs within the thirty days, or, at least, that the furnishing them within the time was dispensed with by the company, through their agent. The doctrine of waiver and estoppel, already discussed, applies to this instruction also. Home Insurance Co. v. Cohen, 20 Gratt. 312.

The court committed no error in refusing the instruction asked for, and in giving it as modified.

The fifth instruction has been disposed of.

The sixth and seventh were refused, and, as I think, properly.

The object of the sixth seems to have been to declare as law that a forfeiture incurred by a breach of any of the conditions of the policy could not be waived, except in writing, if at all, and that a parol waiver by the agent would be nugatory. This proposition has been already determined adversely to the plaintiff in error in disposing of the questions arising upon the other instructions, and need not be further noticed, except to add that the instruction would seem to be faulty for another reason, that it proposed to submit a question of law to the jury for their determination, to wit.: whether there had been *such* a violation of the conditions of the policy *as* to work a forfeiture. Whether the facts and circumstances which constitute a forfeiture are proved, is a question for the jury; whether, when proved, they constitute a forfeiture, is matter of law for the court.

The seventh instruction asked for was based, as is supposed, on the third condition of the policy, imposing a forfeiture by reason of "a foreclosure of a mortgage." It is sufficient to say that there was no foreclosure of a mortgage in this case; and if a judicial sale under a creditor's bill could, by liberal construction, be brought within the operation of the condition, still such sale must have been so far perfected as to make it equivalent to the foreclosure of a mortgage. There was no such completed sale in this case. The land, with the insured building upon it, was, as shown by the record, ordered to be sold before the building was burned, but the sale was never completed. It was made and reported to the court, excepted to and never confirmed. On the contrary, it was afterwards set aside and wholly vacated. The purchaser was never let into possession, and was never at any time entitled to such possession. By the express terms of the decree ordering the sale, the commissioner, who was appointed to make it, was directed to announce publicly at the time of sale, "that no sale under the decree should be valid until ratified by the court." This direction would seem to have been unnecessary, but the commissioner followed it, as shown by his report. 2 Dan. Ch. Prac., 1274, 1281.

The instruction called the eighth in the bill of exceptions was asked for as an addition to modified instruction number two. It may be doubtful whether this instruction might not have been properly given, but at all events the refusal to give it did not and could not prejudice the defendant, because it was substantially covered by the instruction which was substituted for it.

The propriety of the instructions given on the motion of the plaintiff's counsel has been settled in considering and determining the questions arising upon the defendant's instructions, and need not be further noticed. See Story on Agency, §§ 77, 106, 126, 134.

It only remains to consider the third bill of exceptions taken by the plaintiff in error to the judgment of the court overruling the motion for a new trial, made upon the ground that the verdict of the jury was contrary to the law and the evidence. The bill sets out the *facts* certified as proved on the trial, and those facts seem sufficient to warrant the verdict.

As before stated, there was considerable conflict in the testimony of the two main witnesses touching material facts. It was the peculiar province of the jury to deduce the facts involved in this conflict. They did so, and the judge who presided at the trial concurred with them in their finding. The law was applied by the jury to the facts, under the direction of the court; in which directions, as has already been shown, there was no error. The rules which govern applications for new trials, based upon the ground that the verdict of the jury is against the law and the evidence, are well settled by numerous decisions of this court. They are well stated by Judge Christian, in a late case. Blosser v. Harshberger, 21 Gratt. 214.

Upon the whole, I am of opinion that there is no error in the judgment of the Corporation Court for the City of Lynchburg, and that the same should be affirmed with damages.

MORCURE, J., dissented.

NOTE—1. The contract of fire insurance on a building is purely a personal contract between insurer and insured, which the latter can not pass to any other party without the consent of the insurer. 2 Parsons Cont. 450; Lynch v. Dalzell, 4 Brown's P. C. 431. A covenant to keep buildings insured runs with the land in some cases. Hughes on Ins. 392. But the personal contract of insurance does not run with the land, nor survive, to the heirs of the insured. Wyman v. Wyman, 26 N. Y. 253. In certain cases where special circumstances indicated an intention to insure the interests of the heirs, or devisees, the proceeds of the policy have been treated as real assets. Norris v. Harrison, 2 Madd. Ch. 481; Parry v. Ashley, 3 Simons, 97; Colburn v. Lansing, 46 Barb. 37; Globe Ins. Co. v. Boyle, 21 Ohio St. 116; Clinton v. Hope Ins. Co., 45 N. Y. 454; in the last named case the "estate of Daniel Ross" being named as beneficiary. But as a general rule, "if the covenant does not name the *heirs*, the executors of the insured, and not the heirs, will be entitled to the proceeds of the policy, and these proceeds will go to pay debts, instead of being applied to rebuild houses." Ellis on Ins. 84. So in Mildway v. Folgham, 3 Ves. Jr. 471, where the contract was with the insured and her personal representatives, and one of the houses insured having been burned after her death, and there having been no assignment of the policy, the suit of the heir to recover the proceeds was denied.

But what construction should be given where the term "legal representatives" is employed in a fire policy? As a general rule, the courts will construe these words to mean personal representatives, heirs, or next of kin, according to the context, the circumstances of the case, and the intention of the party using them. Where these words have been used in a will or marriage settlement, with respect to personal estate, they have been held to mean "next of kin." Bridge v. Abbot, 3 Brown's Ch. R. 224; Drake v. Pell, 3 Edw. Ch., * p. 251, 270; Jennings v. Gallimore, 3 Ves. 146. So, for like reasons, under certain circumstances, the words "personal representatives" were held to mean "next of kin." Baines v. Otley, 1 M. and K. 465. And where, in a life policy, the words "heirs and representatives" were employed, the latter term was, on like considerations as to the intention of the insured, held to mean "next of kin." Loos v. John Hancock Mut. L. I. Co., 41 Mo. 538. On the interpretation of the words "legal representatives" the principal case is in harmony with those cited.

2. Alienation, within the meaning of the policy, can not be predicated of a judicial sale prior to confirmation. Farmer's Mut. I. Co. v. Graybill, 74 Penn. St. 17. Such a sale is of course only conditional until confirmation; and a

conditional sale never amounts to an alienation. May on Ins., § 273, and cases cited.

3. The rule quoted from Mr. May, that the clauses of the policy will be construed most strongly against the insurer, whose language they are, is properly applicable only so far as those clauses are ambiguous, equivocal or inconsistant. Thus applied, the rule is supported by abundant authority. See May on Ins., § 175, and cases there cited; Catlin v. Springfield Ins. Co., 1 Sumner, 434; Hoffman v. Ætna Ins. Co., 32 N. Y. 414; Reynolds v. Commerce Ins. Co., 47 N. Y. 597; Pelly v. Royal Exchg. Co., 1 Burr. 349; Fawkes v. Manchester Life Asso., 3 Best. & S. (Q. B.) 917.

4. There was a plain breach of condition four of the policy, relating to the vacating of the building, and condition six, requiring proofs of loss to be furnished within thirty days; from which, however, the insured was relieved by the express waiver by the insurer's agent. Harsh, though it may seem, thus to allow the printed and written conditions of the contract to be waived and nullified by parol, this result is reached by the application of well known principles of the law of agency. In fire insurance, at least, the powers of the insurer's agent are very generally recognized by the courts as extending to all matters within the ordinary scope of possible transactions relating to the making of the contract, issuing and delivery of the policy, receipt of the premium and granting permits or privileges under the policy; and all this without reference to any instructions to the agent, or limitations upon his authority, not disclosed to those with whom he deals. In addition to the leading case in 26 Iowa, and others referred to in the principal case, see, notably, Ætna Ins. Co. v. Maguire, 51 Ills. 342. But the cases which illustrate this principle are too numerous for present citation. They may be said to establish, as a general rule, that any act or agreement of the agent, which would be sufficient primarily to bind the insurers in the absence of special conditions, will suffice also to waive any such conditions, though written or printed. The rule takes, in a late case noted in a recent number of this journal, this form: That a subsequent ratification of the act, with a full knowledge by the agent of all the facts, is equivalent to a precedent consent. Williamsburg Fire Ins. Co. v. Cary (Ills.), 4 Cent. L. J., 167. P.

CORRESPONDENCE.

CONTRACTS LIMITING THE LIABILITY OF CARRIERS.

To the Editor of The Central Law Journal:

In a note to the case of Boskowitz *et. al.* v. The Adams Express Company, 5 Cent. Law Journal, 58, occurs the following passage, criticising the decision in that case: "The rule laid down in the principal case, requiring the carrier to furnish the most satisfactory evidence that the terms of the contract limiting liability, were comprehended and assented to by the shipper, is an arbitrary departure from the requirements of the common law, and, we think, clearly against the current of authority. If anything is well settled, it is that one who receives a written contract, without objecting to its terms, will be presumed, in in the absence of fraud or imposition, to have assented to it; and we see no good reason why a common carrier should be excepted from the operation of this rule."

It seems to me that the rule, as laid down, is not only not "an arbitrary departure from the requirements of the common law," but it is founded in reason, and sustained by numerous authorities, and that there is a reason why, as to a contract of shipment, a carrier should be excepted from the operation of the rule that one who receives a written contract, without objection to its terms, will be presumed, in the absence of fraud or imposition, to have assented to it; this, too, aside from the fact that the modern bill of lading, and the manner in which it is forced upon the shipper, are in themselves "a fraud and imposition." The reason is that the carrier's liability as insurer does not rest in contract at all, but is attached to his calling by a positive rule of law; that it needs no contract to create it, but does require one to divest him of it; that whenever goods are shipped in the absence of an express contract as to the carrier's liability, the law attaches that of an insurer, and this feature is wanting in other contracts.

It was doubted, for a time, by many courts, if the carrier could in any way lessen this liability, and, though it is now admitted that he can, the authorities are unanimous that he can do it only by an *express contract*, and that a notice brought home to the shipper is not enough, at least unless the carrier proves it was assented to. R. R. Co. v. Manufacturing Co., 16 Wall. 190; 2 Parsons on Contracts, 238 note N.; Jones v. Vorhees, 10 Ohio, 145; Moses v. R. R. Co., 24 N. H. 71; Moses v. R. R. Co., 32 N. H. 523; Brown v. Eastern R'y Co., 11 Cush. 97; New Jersey St. Nav. Co. v. Merchants Bank, 6 How. U. S. 344.

It is admitted on all hands that the carrier has, at most, but these two ways of limiting his liability—by notice, brought home to the shipper and assented to by him, and by express contract in parol or writing. But how can there be an express contract without mutual assent? Aside from the fact that "express contract," *ex vi termini*, implies mutual assent, the same reason which requires the notice to be assented to, requires the shipper's assent to the terms of the bill of lading limiting the carrier's liability. Assuming even that *express* assent is not required, and that *implied* assent might, under some circumstances, be enough, are the facts, in an ordinary case of shipment of goods where the shipper simply delivers the goods, and receives from the carrier an ingeniously constructed bill of lading, doing away entirely, generally by clauses in fine, almost illegible print, with his common law liability, such as to warrant the inference of assent? The shipper, it must be remembered, is practically at the mercy of the carrier, who may refuse to carry on any terms but those he chooses to prescribe, throwing the shipper back on his unsatisfactory remedy of an action for the refusal. In the case cited, R. R. Co. v. Manufacturing Co., 16 Wall., the court say, page 329, "If the parties were on an equality in their dealings with each other, there might be some show of reason for assuming acquiescence from silence; but in the nature of things this equality does not exist, and therefore every intendment should be made in favor of the shipper, when he takes a receipt for his property with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights." The carrier is bound to carry subject to his liability as insurer, and as men are generally tenacious of their rights, the fair inference would seem to be, rather that the shipper insists on his legal right, than that the carrier does on an illegal pretension. Redfield on Carriers and other Bailees, § 141, page 118.

In the case cited from 6 Howard, United States, the court, per Nelson, J., say: "If any implication is to be indulged in from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification." We think it is even stronger. In the case cited from 16 Wall., the court say, after quoting the above: "These considerations against the relaxation of the common law responsibility by public advertisements, apply with equal force to notices having the same object, attached to receipts given by common carriers, on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain by indirection, exemption from burdens imposed in the interests of trade, upon this particular business. It is not only against the policy of the law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the

terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them."

Whatever may be the rule where the delivery of the goods and the receiving of the bill of lading are concurrent acts, and we admit that there is a conflict of authority as to this, yet where the goods are delivered to the carrier, and no bill of lading is given until after the transitus has technically begun, (and it begins as soon as the carrier, *as such*, takes the goods into his possession and control), both principal and the weight of authority are clearly that the stipulations of the bill of lading are not binding. Where, too, as is often the case, there is a previous verbal agreement between the parties, under which the goods are delivered to the carrier, the contract is complete at the moment when the price of carriage and the destination are agreed upon, and the carrier is bound to carry the goods subject to his liability as an insurer of them. If, now, in either of the above cases, after the delivery of the goods to him, the carrier hands the shipper a bill of lading limiting that liability, it would seem to us that, even if the shipper assent to its terms, he would not be bound by such assent, because given without consideration. The verbal contract in the one case, and the implied contract in the other, gives the shipper the right to have the goods carried at the price fixed in the one case, and at a reasonable price in the other, and in both, the right to hold the carrier as an insurer of the goods. The subsequent agreement to release the latter right, unless made upon a new consideration, would clearly not be binding. But waiving the question of consideration for the agreement to release the carrier from his common law liability, it is clear that the shipper must at least *agree* to so release, must assent to the terms of the bill of lading; for it is undeniable that where a contract has once attached, its terms can not be changed without the assent of both parties to it. It can not be claimed, that the previous verbal contract related only to the price of carriage, and was in other respects to be subject to the terms of a bill of lading to be thereafter given, or that the delivery, in the absence of any contract, where the bill of lading was not concurrently given, was with a like understanding, without showing that the shipper as well as the carrier actually so understood it, *i. e.*, expressly assented. The carrier can not say, that it is a custom of railroads to ship only under bills of lading limiting their liability, except when otherwise agreed, and that such custom was known to the world, and therefore binding on the shipper. The law says that a common carrier shall be held liable as an insurer of the goods he carries: the carrier can not be heard to say, "But we have a custom of not making ourselves so liable, and you shall not appeal from our custom to the law." A custom of a common carrier not to be subject to the liabilities of a common carrier is simply absurd.

It may be admitted that there is an apparent preponderance of authority against the views above expressed, but it is only apparent. The majority of cases are decided on the terms of the bill of lading, because, as a general thing, the shipper, in bringing suit, declares on the bill of lading; thus, by the form of his pleading, estopping himself from raising the question of assent. But where the pleadings have been such as to permit this question to be raised (as we suppose was the fact in the principal case, for the report says it was assumpsit against the defendants on *their common-law liability as common carriers*), we think it will be found in the majority of cases that the courts require the carrier to prove the shipper's free, fair and express assent to the restrictions in the bill of lading. It was so held in Southern Express Co. v. Moore, 39 Miss. 822; Levering v. Union Transportation Co., 42 Mo. 88; Adams Express Co. v. Haynes, 42 Ill. 89, and Adams Express Co. v. Stettaners, 61 Ill. 184; in all of which the bill of lading was given concurrently with the delivery of the goods to the carrier. In the case cited from Missouri, the second clause of the syllabus is as follows: "To have this effect [of limiting the carrier's liability], there must be a special contract assented to by the shipper. Public policy and fair dealing, on which the liability of a common carrier is founded, can not be undermined and frustrated by the design and circumvention of artfully prepared printed receipts, thrust upon the public without the opportunity of fair assent, in the press and hurry of railroad travel."

The case of Adams v. Buckland, 97 Mass. 124, was as follows: A. and B., co-partners, bought goods at a factory, and left them in charge of a workman in the factory to ship, but gave him no instructions as to the terms of shipment. He shipped them per Adams Express, taking the usual delusive receipt. For several weeks previous the Express Company had taken packages to carry for the manufacturers, giving similar receipts therefor, and A. was the book-keeper of the manufacturers and had charge of the receipts. The company had also carried numerous packages for A. and B., sometimes giving such a receipt, and the rest of the time none at all. The court held, that on these facts it did not appear that A. and B. assented to the limitations in the bill of lading, and were not bound by them. That the shipper's assent is necessary, is also held in Perry v. Thompson, 98 Mass. 249.

In Grace v. Adams, 100 Mass. 505, it is laid down that, where the delivery of the goods and of the bill of lading are concurrent, the shipper is bound by the terms of the bill, and evidence is not admissible to show that he did not read and assent to them. But in Gott v. Dinsmore, 111 Mass. 45, it was held that a stipulation limiting the liability of a carrier, contained in a bill of lading given to the sender of the goods on his request after the goods were lost, does not affect the sender's rights, nor are they affected by the fact that he had lately been the carrier's freight agent, and the receipts given by him as such contained the same stipulations. The court, page 52, expressly put the decision on the ground that the bill of lading was not given concurrently with the delivery of the goods. In Bostwick v. B. & O. R. R. Co., 45 N. Y. 712, the goods had been delivered to the carrier under a verbal agreement; subsequently the usual bill of lading was given to the shipper. The court held that the verbal agreement was not merged, and that the restrictions of the bill of lading were not binding on the shipper; citing the unreported case of Corey v. N. Y. Central R. R., decided by the same court.

In the case of Gaines v. Union Transportation Co., decided by the supreme court commission, and to be reported in 28 Ohio State Rep., the facts were similar to those in the preceding case, as was also the decision of the court, who say: "The clear weight of authority is, that sound principles of public policy demand that the common carrier should be held strictly to his common-law liability, unless it is limited by *express agreement*, and that the principles of law which create obligations *ex contractu*, by an *implied* or *constructive* assent, have no application to contracts limiting the liability of a common carrier." See also Fillebrown v. G. T. R'y, 55 Me. 468, and Kansas Pacific R'y Co. v. Reynolds *et al.*, Supreme Court of Kansas, reported 4 Cent. L. J. 54.

The latest English decisions are in perfect accord with those cited above, even when they do not fall within the operation of the common-carrier act requiring bills of lading to be signed by the shipper, in order to bind him. See the late decision of the House of Lords in Henderson v. Stephenson, L. R. Sc. and

Div. Appeals, 470; Parker v. S. E. R'y, High Court of Justice, 25 W. R. 97, 4 Cent. L. J. 308; Cohen v. S. E. R'y Co., 2 Ex. Div. 253.

G. H. W.

CINCINNATI, July 25, 1877.

NOTES OF RECENT DECISIONS.

DEED OF ASSIGNMENT—CONSTRUCTION.—*Rhoades v. Blatt*, Sup. Ct. Penn., 14 N. B. R. 32. Opinion by PAXSON, J. An assignment for the benefit of creditors of "all the goods, chattels and effects and property of every kind, personal and mixed," does not pass the real estate to the assignee.

PRACTICE IN BANKRUPTCY—CONFIRMATION OF ASSIGNEE'S SALES.—*In re Alden*, U. S. Dist. Ct., Maine. Opinion by FOX, J.—Under the rules of practice in the district of Maine, the United States District Court, for that district, will not confirm any sales made by an assignee, but will leave the purchaser to establish his title whenever the occasion may arise.

BANKRUPTCY—PARTNERSHIPS.—*In re Jewett*, U. S. Circuit Ct., West Dist. Wis., 14 N. B. R. 48. Opinion by DRUMMOND, J. 1. The fact that persons have been adjudicated bankrupts as members of one firm, is no bar to, nor does it defeat a petition against them as partners with others in another firm. 2. As to whether the individual property of such persons should go to pay the debts of the former or of the latter firm, *quære*.

BANKRUPT ACT—FRAUDULENT PREFERENCE.—*Franklin v. Hewitt*, 14 N. B. R. 27, New York Sup. Court, Third Department. Opinion by BOARDMAN, J. The exchange of a mortgage for notes, in pursuance of a parol contract that such mortgage should be given when the creditor asked for it, is not a preference under the provisions of the bankrupt act, although made within four months before the commencement of bankruptcy proceedings.

BANKRUPTCY—PROOF OF DEBT IN FOREIGN COUNTRY.—*In re Lynch & Emberson*, 14 N. B. R. 38, U. S. Dist. Ct., S. Div., N. Y.—A deposition, acknowledged before an U. S. consular agent, in England, was offered in proof of a claim against the bankrupt's estate. This was rejected by Dwight, register, on the ground that such proof can only be taken in a foreign country before one of the officers authorized by section 5079 of the Revised Statutes, to do so. This decision was affirmed by BLATCHFORD, J.

BANKRUPTCY—LIEN OF ATTACHMENT BY TRUSTEE-PROCESS IN VERMONT.—*In re Peck*, U. S. Dist. Ct., Vt., 14 N. B. R. 43. Opinion by WHEELER, J. 1. Under the laws of Vermont an attachment of a debt by trustee-process creates a lien on the funds in the hands of the trustee after service upon him, although no notice is given to the principal debtor. 2. Such lien is a lien by attachment by mesne process, and will be saved when made the prescribed length of time before the commencement of the proceedings in bankruptcy.

BANKRUPTCY — ASSIGNMENT FOR BENEFIT OF CREDITORS — FRAUDULENT PREFERENCE. — *In re Skoll*, U. S. District Court of Minn., 1 N. W. Reporter, 108. Opinion by NELSON, J. An assignee for the benefit of creditors under the state law does not occupy the position of a *bona fide* purchaser, and, upon the proper institution of bankruptcy proceedings in the federal court, the assignee under the state law may, before an adjudication in bankruptcy, be restrained by that court from disposing of the assets of the bankrupt. Citing *In re* Burt, 1 Dillon, 439.

PARTNERSHIP—LEVY UPON PARTNER'S INTEREST. —*Osborn v. McBride*, U. S. Dist. Court, California, 14 N. B. R. 22. Opinion by HOFFMAN, J. 1. The sale on execution of either or both the partners' interest in the joint assets gives to the purchaser only an interest in such assets as may remain after the payment of the partnership debts. 2. The fact that the interests of both partners were sold on separate executions to the same purchaser can have no effect to enlarge the interest of either partner acquired by such purchaser on the separate sale of such interest, nor to discharge the assets from liability for the partnership debts. 3. Premises used by partners for the purpose of carrying on their business *prima facie* form part of the partnership property; but this presumption may be rebutted.

BANKRUPTCY—WAIVER OF DISCHARGE—FRAUDULENT TRANSFEREE—STATUS OF ASSIGNEE.—*Dewey v. Moyer*, 14 N. B. R. 1, Supreme Court of New York, 3d Dep't. Opinion by LARNED, P. J., and BOARDMAN, J.; BOCKES, J., dissenting. 1. A debtor, whohas been discharged in bankruptcy, may waive the discharge and allow a judgment to be recovered against him for the original debt. 2. Where the debtor has waived his discharge as a defense, it can not be raised by one who is in possession of property of the debtor, transferred with intent to defraud creditors, in an action to set aside such transfer. 3. The assignee is but a trustee for the creditors. While he holds the property, a creditor may bring an action to set aside a transfer by the bankrupt as fraudulent, if he makes the assignee a party; if not, the defendant must set this up as a defect of parties. 4. Upon the discharge of the assignee, the property remaining in his hands reverts to the debtor without reassignment.

CERTIFICATE OF DEPOSIT—STATUTE OF LIMITATIONS—BONA FIDE HOLDER. — *Tripp v. Curtenius*, Supreme Court of Michigan, 1 N. W. Reporter, 110. Opinion by MARSTON, J. Certificates of deposit issued by a bank, payable upon their return, properly indorsed, are, in legal effect, promissory notes payable on demand, and the statute of limitation runs from their date. To constitute a person taking them a *bona fide* purchaser, he must take them shortly after their issue. Party taking such certificate two years and four months after its date, held not entitled to the benefits of a *bona fide* holder. In Cate v. Patterson, 25 Mich. 191, it was held that a certificate of deposit, similar to the one issued in this case, contained all the elements necessary to constitute, and was, in legal effect, a promissory note. In the case of the National Bank of Fort Edward v. Washington County National Bank, 5 Hun, 605, it was held that, where a bank issues a certificate of deposit, payable on its return, properly indorsed, it is liable thereon to a *bona fide* holder, to whom it was transferred seven years after its issue, notwithstanding a payment thereof to the original holder, that such a certificate was not dishonored until presented.

BANKRUPTCY—PROOF OF CLAIM WHERE BANKRUPT IS DEAD—COMPETENCY OF CLAIMANT AS WITNESS.—*In re Merrill*, 14 N. B. R. 35, U. S. Dist. Ct., Vt. Opinion by WHEELER, J. When the bankrupt is dead, a creditor offering himself as a witness to prove his claim can not be excluded on the ground of interest. The learned judge said: * * * "The law of the forum must, as a matter of course, govern. In these proceedings the courts of the United States constitute

the forum, and consequently the laws of the United States must control in this respect. By those laws no witness can be excluded on account of interest, except in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them. In all other respects the laws of the state govern. Rev. Stat., sec. 858. By the laws of the state, where one party to a contract or cause of action in issue and on trial is dead, the other is excluded as a witness. According to the state law this creditor would be excluded. Such exclusion, however, would be on account of interest of the witness, and contrary to the law of the United States, unless the case would fall within the exception contained in the proviso to the statute on this subject. The proof of a debt against an estate in bankruptcy is not a proceeding against a bankrupt, nor his guardian, if he have one, when he is alive, nor against his executor or administrator when he is dead, but is a proceeding *in rem* solely, and affects the estate only. It is not an action against either an executor or administrator for or against whom any judgment can be rendered in it, and is not within the exception in the law of the United States. The law of the United States prohibits the exclusion of this witness on account of his interest, and, as it would seem, the law of the state which, but for this prohibition, would exclude him, is not in force in this proceeding."

BANKRUPTCY—POWER OF STATE COURT TO COMPEL DISCOVERY BY BANKRUPT, AND TO IMPRISON HIM FOR CONTEMPT—RELEASE OF BANKRUPT BY FEDERAL COURT ON HABEAS CORPUS—SURETY IN GUARDIAN'S BOND.—*Ex parte* Taylor, U. S. Circuit Court, East. Dist. Va., 14 N. B. R. 40. Opinion by HUGHES, J. Where a decree operating as a lien upon defendant's estate has been obtained in a state court, and the defendant afterwards goes into bankruptcy, proceedings under state statute will not lie before a state officer against defendant for discovery of his estate similar to those given by section 5086 of the Revised Statutes of the United States; they must be taken in the bankruptcy court. Where such proceedings are taken before a state officer, and the bankrupt is imprisoned by him, he will be released on *habeas corpus* by a United States Court, where the decree of the state court is not for a fiduciary debt of the bankrupt. The learned judge said: * * * "The validity of the lien which has been mentioned is not disputed. It is a proceeding by one creditor of a bankrupt in another court, analagous to that which is given the assignee in bankruptcy and to any creditor in the bankruptcy court, by sections 5086 and 5104 of the Revised Statutes of the United States. The proceeding of this commissioner raises the question: Which court has jurisdiction to ascertain and liquidate liens upon the estate of the bankrupt, and to require the bankrupt to make discovery of his estate? This question would seem to be answered in the mere statement of it. Section 711, R. S. of the U. S., gives the United States Courts jurisdiction exclusive of the courts of the several states, amongst other things, of 'all matters and proceedings in bankruptcy.' Section 4972 extends the jurisdiction of the U. S. District Court in bankruptcy, amongst other things, 'to all causes and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens thereon; to the adjustment of the various priorities and conflicting interests of all parties,' etc. Ancillary to this jurisdiction, section 5086 empowers the district court, 'on the application of the assignee in bankruptcy or any creditor, or without any application, at all times to require the bankrupt to submit to examination under oath upon all matters relating to the disposal or disposition of his property.' Therefore, the bankruptcy court not only has exclusive jurisdiction over the estate of this bankrupt, but also of all 'proceedings,' such as that in question, looking to a liquidation, among other things, of the lien of the decree of the complainants in the suit of Walters, etc., v. Byrd *et al.*; and those creditors have even more ample power to probe the bankrupt's conscience and obtain a discovery of his estate in the bankruptcy court, than they have in the proceeding taken against him by Commissioner Oldham, even if that proceeding was legal. That such a proceeding before a state officer, when against a debtor after he files his petition, and is adjudicated in bankruptcy, is illegal, strikes me to be as clear as any proposition of law can be. The proceeding before Commissioner Oldham being illegal and nugatory, the petitioner (the bankrupt) is not legally in the custody of the sheriff of Accomac. The second inquiry is as to the jurisdiction of this court to discharge the bankrupt from this illegal custody. Section 5091 provides that 'no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.' So that the only question on this latter head is, whether or not the obligation of a surety upon a guardian's bond is one from which a bankrupt is released by his discharge in bankruptcy. There can be no doubt on this subject. The obligation of the guardian is a fiduciary one, from which the guardian himself can not be discharged in bankruptcy; but that of the surety is not fiduciary within the terms and meaning of section 5117 of the bankrupt law. The language of that section is, that no debt of a bankrupt, 'created while acting in a fiduciary character, shall be discharged under this act;' language which refers only to the fiduciary himself, and not to his sureties. The prisoner must therefore be discharged; but I will at once require him to submit before the register in bankruptcy to such interrogatories as the creditors in the decree of the state court shall desire to propound."

NOTES OF RECENT ENGLISH DECISIONS.

SEA-WALL—LIABILITY TO REPAIR—FRONTAGER—PRESCRIPTION.—*Hudson v. Tabor.*—High Court, Q. B. Div., 25 W. R. 741.—The owners of lands fronting the sea are under no common law liability to repair sea-walls. The fact that an owner of sea frontage has always repaired the sea-walls by which his property is protected, does not of itself establish his liability to repair by prescription or *ratione tenuræ*. Judgment of the Queen's Bench Division (reported 24 W. R. 579, L. R. 1 Q. B. D. 225) affirmed.

VENDOR AND PURCHASER—COAL MINE—COMPENSATION FOR COALS WRONGFULLY SEVERED.—*Brown v. Dibbs.* Privy Council, 25 W. R. 776. When a vendor of a coal mine, against whom a suit for specific performance was brought, had, during his delay of completion, worked the mine for his own benefit, *held*, that the purchaser was entitled to compensation on an estimate of market value of the coal *in situ*, *i. e.*, the value at the place where it was to be sold, less cost of severing and taking it from the mine to that place.—*Jegon v. Vivian*, 19 W. R. 365. L. R. 6 Ch. 742, followed.

PRACTICE—BILL OF REVIEW—SUIT TO SET ASIDE—SALE BY DECREE IN FORMER SUIT FOUND VALID.—

Turner v. Tepper. High Court, Chy. Div., 25 W. R. 726. A suit was instituted to set aside for fraud a sale by client to solicitor. The solicitor had died, and his estate had been administered in a suit under the decree in which the present plaintiffs had come in, and in their presence an order had been made in the administration suit declaring the sale good. The fraud for which it was sought to set aside the sale was discovered subsequently to the order in the administration suit. *Held*, that the sale could be set aside, notwithstanding the order in the administration suit, and without a bill of review.

MASTER AND SERVANT—NEGLIGENCE—LIABILITY OF COAL MERCHANT, AND OF OCCUPIER OF PREMISES TO WHOM COALS DELIVERED.—*Whiteley v. Pepper.*—High Court, Q. B. Div., 25 W. R. 607.—The defendant was a coal merchant, one of whose carmen, having forgotten the name of the person to whom he was ordered to deliver some coals, delivered them to the occupier of a house who told him that he had not ordered them, but would take them as they were there. By the negligence of the carman in not giving notice to the plaintiff that the iron gird or plate was up, the plaintiff was injured. *Held*, that the defendant was liable in an action for damages. *Quære*, whether the person to whom the coals were delivered was, too.

COMPANY—PROSPECTUS—NON-DISCLOSURE OF CONTRACT—COMPANIES ACT, 1867 (30 & 31 Vict., c. 131), *s.* 38—DAMAGES, MEASURE OF.—*Twycross* v. *Grant.* Court of Appeal, 25 W. R. 701.—The defendants, C. & P. and G., were promoters of a foreign tramways company. Before issuing the prospectus, C. & P., who were the contractors for the works, agreed to pay to G. and to the Duke de S., who held concessions for making the tramways, certain sums, which they included in their contract price for executing the works. These contracts with G. and the Duke de S. were not disclosed in the prosectus. The plaintiff brought an action against the defendants for the whole amount he had paid for shares in the company. *Held*, first, by Bramwell, L. J., and Kelly, C. B., that the contracts were not within section 38, of the Companies Act, 1867, and that it was not needful to disclose them in the prospectus. By Cockburn, C. J., and Brett, L. J., that they were within section 38 of the Companies Act, 1867, and ought to have been disclosed. Secondly, by Bramwell, L. J., Cockburn, C. J., and Brett, L. J., diss. Kelly, C.B., that the measure of damages was the whole amount paid by the plaintiff when he bought the shares. Judgment of the common pleas division (25 W. R. 586), affirmed.

LICENSED PERSON FOUND DRUNK ON HIS OWN LICENSED PREMISES WHEN CLOSED TO THE PUBLIC. —*Lester v. Torrens.*—High Court, Q. B. Div., 25 W. R. 691.—The landlord of a licensed public house, who is found drunk within it, when it is closed to the public, can not be convicted under the Licensing Act, 1872, § 12, for being found drunk on licensed premises. MELLOR, J.: "We are of opinion that this conviction is erroneous. The Act only contemplates an offense against the public, and has nothing to do with what is only an offense against private propriety and decorum. A publican is not under an obligation to remain sober all night when his house is closed against the public, and his own family and servants only are within it; the court has not to do with the private morality of publicans. When the context and connection of the words in the section are looked at—'Every person found drunk in any high way or other public place, whether a building or not, or on any licensed premises, shall be liable,' &c.—the word 'found' seems to me to imply that a person is to be found by some person who may be there for the purpose of using the premises as licensed premises, *i. e.*, while they are open to the public. If this man could be convicted, a publican would be in a different position from every other person. If the legislature had intended such to be the law, words would have been used to the effect that a publican must never be drunk at any place at any time."

ANCIENT LIGHTS—NATURE OF THE RIGHT—CHANGE OF THE POSITION OF WINDOWS IN DOMINANT TENEMENT—2 & 3 WILL 4, c. 71, *s.* 3—MANDATORY INJUNCTION—DAMAGES.—*The National and Provincial Plate Glass Insurance Company v. The Provincial Insurance Company.* High Court, Chy. Div., 21 Sol. J. 781. In this case a somewhat novel question arose with regard to the nature of the easement or right to the access of light which is acquired by twenty years' enjoyment by the owner of a dominant tenement as against the owner of a servient tenement. The action was brought to restrain an obstruction by the defendants of the access of light to the plaintiff's house, and in particular to a skylight in one corner of the ceiling of a room on the ground floor of the house. The plaintiffs had, about five years before the commencement of the action, made considerable alteration in their house, and had substituted the skylight in question, which was a nearly horizontal one, for a dormer window, which was nearly vertical, and it was contended that, by reason of this alteration in position and nature of the aperture by which the light was admitted, the plaintiffs had lost that right to the access of light which they formerly possessed. The argument was that the right to the access of light is a right to have the light which comes through an existing aperture, and no other, unobstructed, or not obstructed to any material extent, and that, if that aperture is destroyed by the owner of the dominent tenement and another new of the domident tenement and other new aperture substituted for it, situate in another parallel plane, or in a plane inclined at an angle to that in which the original aperture was situated, the right to the access of light is lost. The only change which the owner of the dominant tenement could make without affecting his right, would be an alteration of the dimensions of the aperture, leaving it in its original place, and, indeed, the well-known case of Tapling v. Jones (11 H. L. C. 290) shows that he could go to this extent. But it was contended that he could go no further. Fry, J., however, held that the right to the access of light is a right to have a certain space above the servient tenement left unobstructed for the passage of light, the measure of that space being the existing aperture. Consequently, a change in the position of the aperture would not affect the right, provided that in the new state of things the light coming through the space in question would still be used by the owner of the dominant tenement. This view of the nature of the right to the access of light appears to amount, if not to an extension, at any rate to a novel explanation of the doctrine laid down by the House of Lords in Tapling v. Jones. Fry, J., thought that his view of the right was supported by the language of section three, of the Prescription Act, in which the word "window" does not occur, but which speaks of "the access and use of light to and for any dwelling-house, workshop or other building," as the right which is to be protected by actual uninterrupted enjoyment for twenty years. It is, however, to be observed that Lord Westbury, in his argument in Tapling v. Jones (11 H. L. C. 305), says that in lieu of the words "the access and use o light to and for any dwelling-house" there may wel

be read "any window of any dwelling-house," and treats the enactment as equivalent to one that, after twenty years' enjoyment, "the right to such window shall be deemed absolute and indefeasible." In the case before Fry, J., an interlocutory injunction had been applied for, and instead of it the defendants had given an undertaking to pull down their buildings in case the court at the trial should be of opinion that they ought to do so. Fry, J., held that he ought to award damages instead of granting a mandatory injunction, on the ground (1) that the plaintiffs had delayed the service of the writ for some weeks after they had become aware of the nature of the defendants' plans; (2) that the materiality of the injury to the plaintiffs was much less than the materiality of that which would be occasioned to the defendants by the pulling down of their buildings; and (3) that that part of their buildings which would affect the plaintiff's skylight formed a portion of one entire building scheme, other portions of which would result in benefit to the plaintiffs. His lordship accordingly awarded the plaintiffs £200 damages in lieu of an injunction, but deprived them of the costs of the action, because they had originally put their case too high.

SHIP—DAMAGE TO CARGO—DELAY—LOSS OF MARKET—MEASURE OF DAMAGES.—*The Parana.*—Court of Appeal, 25 W. R. 597.—Action to recover damages for breach of contract, contained in two bills of lading, for the carriage of certain quantities of sugar and hemp, from Manilla to London. The breach alleged and admitted was that the boilers of the steamer were in a bad condition, and that, in consequence, an undue delay took place during the voyage. The register found that a delay of thirty-six days should be imputed to the ship-owners, and that he was liable for the damages occasioned by this delay. In assessing the damages he gave a certain sum for leakage of the sugar, which had taken place during the delay; but the question arose, whether, in addition to these damages, the plaintiff was entitled to recover damages in respect of a fall in the price of the hemp, which he alleged had taken place between the time when the cargo ought to have arrived and the time when it did arrive. The register held that damages, in respect of such fall in price, ought not to be allowed. On appeal to the judge of the admiralty division, this decision was reversed and damages assessed. On appeal to the court of appeal, it was *held*, (1) that the decision of the register was right, and that the plaintiff was not entitled to damages for loss of market; (2) that the carriage of goods by ship, on a long voyage, is entirely different from the carriage of goods by railway, when they may be expected to arrive on a particular day or for a particular market, and loss of market on such a voyage can not (in absence of express stipulation) be said to have been within the contemplation of both parties, at the time of making the contract, so as to be recoverable as damages in case of delay in carriage. MELLISH, L. J.: "The difference between cases of that kind (carriage by railway) and cases of the import of goods for a long distance by sea, seems to me to be very obvious. In order that the damages may be recovered, we must come, I think, to the conclusion, first, that it was reasonably certain that the goods would not be sold until they did arrive; or, secondly, that it was reasonably certain that they would be sold immediately after they arrived, and that that was known to the carrier at the time when the bills of lading were signed. It appears to me that nothing could be more uncertain than either of these two assumptions.

Goods, imported by sea, may be, and are, every day sold whilst they are at sea. If the man who is importing the goods finds the market high, and is afraid the price may fall, he is not prevented, as an ordinary rule, from selling his goods because they are at sea. The sale of good to arrive, the sale of goods on transfer of bill of lading with costs, bills and insurance, is a common mercantile contract made every day. It may be from not having samples of the goods, or from not knowing what the particular quality of his goods is, he may have a difficulty in selling them until they arrive; but the carrier would not necessarily know that the plaintiff himself is not the original consignee; he is a man who acquired the goods apparently by the consignment of the bill of lading whilst the goods were at sea. We were told that he was a person who had advanced money on the security of the bills of lading; that may be possibly the case, but whether he has done that, or is the purchaser, would make no difference. It was said, if the goods were sold, if the person who sells them does not suffer the damage, that the purchaser would suffer the damage; but that is pure speculation. If a man purchases goods whilst they are at sea, no person can say for what purpose he purchased them. He may purchase them because he thinks if he keeps them for six months they would sell for a better price, or he may want to use them in his trade. It is pure speculation to enter into the question for what purpose he purchased them. In this particular case the plaintiff did not sell the goods as they arrived; he sold them some months afterwards, when a further fall took place in the market. Of course he does not seek to recover from the defendant that additional loss, but it serves to illustrate how uncertain it is whether he would have sold them. If he did not sell them when they did arrive, but kept them because he thought the market would rise, how could we tell he would not have done exactly the same thing if the goods had arrived in time? Therefore, it seems to me, to give these damages would be to give speculative damages—to give damages when we can not be certain that the plaintiff would not have suffered just as much loss if the goods had arrived in time; and, I think, according to the principles on which the courts have acted in all these speculative and uncertain cases of damages of this kind, that in this case damages for loss of market ought not to be recovered.

JUDGE DILLION.

A COMPLETE REFUTATION OF THE CHARGES AGAINST HIM—SOME INTERESTING CORRESPONDENCE.

On the 30th of July the editor of this journal wrote a letter to Hon. James Grant, of Davenport, solicitor for the complainant in the case of The Farmer's Loan and Trust Co. v. The Central Railroad Co. of Iowa, asking him to state, if not incompatible with his professional duties, the origin of the charges against Judge Dillion, which have been floating about in some of the Eastern papers, and the motives which prompted them. To this letter, Judge Grant sent the following prompt and frank reply:

I. LETTER OF HON. JAMES GRANT.

DAVENPORT, IOWA, Aug. 1st, 1877.

Seymour D. Thompson, Esq., St. Louis, Missouri:

DEAR SIR:—I have yours of 30th July. I have not until last Thursday written anything about the charges against Judge Dillon, because when I first heard of them I attached no importance to them, and when the article in the *Nation* was published, I was absent in Colorado. I was also influenced by Judge Dillon's known repugnance to having his friends repel newspaper assaults, and I knew, that so far as he was concerned, time would make all things even.

In the month of June, 1874, I was advised by the Farmer's Loan and Trust Company, that Alexander, Boardman, and others, had begun foreclosure proceedings against the Iowa Central Railroad, and had made them defendants. They desired me to represent them. I examined Alexander's bill, discovered that it charged the trustee in the

mortgage with neglect. On my advice the trustee filed an affidavit denying any neglect and offering to do everything required of it by the deed of trust. The railroad company, represented by *Isaac M. Cate*, its president, demurred to the bill. The court held (see Alexander v. Central Railroad, 3 Dillon, 487), that the demurrer should be overruled, but if the bill was dismissed by Alexander as to the Farmer's Loan and Trust Company, they could file the bill in their own name as trustee.

The bill was immediately dismissed as to the trustee, and the trustee had leave to file a bill to foreclose all the mortgages, of which there were three. I filed this bill. The next day I copied into it a charge made in Alexander's bill, that Horace Abbott, John S. Gilman and Isaac M. Cate, directors and president of the railroad company, had recovered judgments against the railroad company in a county outside of the one where the general business was transacted, and that Pickering, the superintendent, had gone out of the county to accept services of process, at their suits.

These judgments, by the record, were recovered in the January previous, and one in favor of Isaac M. Cate, for $108,225.60, one in favor of Horace Abbott for $31,353.12, and one in favor of Gilman for $48,896.60.

Cate afterwards admitted on the record of the suit that his judgment included a $10,000 draft which had been paid when his judgment was recovered.

Horace Abbott, John S. Gilman, Isaac M. Cate, and Thomas Kensett, a business associate of Abbott, were, when the judgments were recovered, directors of the railroad company. Abbott is a wealthy iron merchant of Baltimore; Cate and Gilman are his sons-in-law. The parties, Abbott, Cate, Gilman and Kensett, while directors of the company, had leased to it four locomotives at a rental of 20 per cent. per annum on a valuation of $56,000, of which, during the progress of the cause, the market value has been proved to be $40,000, and the manager of Hinckley Locomotive Works, who has been examined in a collateral matter, refused to answer a question, whether Cate charged the Hinkley company a commission for the sale of engines to the Iowa Central Railroad.

Cate, as president of the company, had counsel appear and demur to the foreclosure suit. He had counsel file an answer to the bill when the demurrer was overruled. When, or before, Cate was appointed president of the road, he made Pickering the superintendent At the term of the court when the trust company's bill was filed, Judges Dillon and Love, on the trustee's attorney's motion, without the petition of a bondholder, to prevent conflicting jurisdiction of a receiver by the state courts, appointed Pickering, Cate's superintendent, provisional receiver until the court should appoint a permanent one, and I believed the court never conferred on Pickering any other appointment.

Many of the bondholders, particularly the Alexander party, were bitterly opposed to this temporary appointment. Their affidavits on file in this case in opposition to his appointment would *fill a peck measure*, and they came from over two hundred bondholders in number, representing a million of dollars.

Upon a hearing before Judge Dillon, at my office, on the 7th of January, 1875, (which has been used by the judges of the state and federal courts for such purposes for a period of more than twenty years) an application was made to him to appoint some suitable person to examine into the affairs of the road. Various names were suggested by opposing counsel. Judge Dillon said to us, "you must agree, gentlemen." An adjournment was had until after dinner. We unanimously, *including Cate's attorneys*, agreed to refer the matter to Hiram Price, a very fit man, a railroad builder and railroad manager, and a gentleman who has the good fortune to be Judge Dillon's father-in-law. Judge Dillon required earnest solicitation to induce him to make the appointment, though our recommendation *was unanimous and urgent*.

Mr. Price made a report in which he censured the management of Mr. Cate, the president, and Pickering, his superintendent, as extravagant, and he recommended changes in the management, which would save the bondholders the sum of $66,000 a year.

Among other things of mismanagement, Mr. Price reported that there was a coal company called the Hardin & Mahaskia County Coal Company, which, operating neither coal lands nor owning any which were operated, had a monopoly of the sale of coal on the road, and charged *the railroad company* 10 cents a ton, and all other parties 25 cents a ton, for the privilege of purchasing coal and carrying it over the Iowa Central road.

Mr. Price reported the loss to the road and the public for these items alone to be the sum of "$17,400 a year."

Mr. Price also reported the price for lease of the four engines, and 200 cars of another party, to be at exhorbitant rates of interest. He reported that the engines were not necessary for the business of the road, and recommended the abandonment of the contract. The annual loss on these four engines, *belonging to Abbott, Kensett, Gilman and Cate*, he reported at "$8,400," the rental being 20 per cent on a nominal sum of $56,000.

Pickering, Cate's superintendent, and the court's provisional receiver, paid little regard to Price's report, and published a handbill in reply to it. In conversation with Price, *he admitted the necessity of reform*, but said he had no power to make any.

At that time none of us understood the cause of Pickering's discontent. Shortly after, a copy of Price's report was published in Boston with a letter from A. Boler, in which he disclosed that the capital stock of the said Hardin & Mahaskia County Coal Company was $167,000, and that *Isaac M. Cate*, the president, and Horace Abbott, J. S. Gilman and T. Kensett, directors in the railroad company, were *stockholders* in the Hardin & Mahaskia Coal Company.

Isaac M. Cate is the author and instigator of the charges against Judge Dillon. So long as Pickering was receiver, and Cate and his co-directors were receiving rental on their locomotives, Judge Dillon was "a most just, most honest, most excellent judge."

There were three mortgages on the property. Messrs. Abbott, Cate, Gilman and Kensett have large *unsecured* debts against the corporation, amounting to nearly $250,000; they have a large interest in the *second* mortgage bonds, worth nothing; a large stock interest, worth nothing, and a *small first* mortgage bond interest.

They have by demurrers, by answers, by motions, by every means which legal ingenuity could suggest, *opposed every effort of the trustee to effect a foreclosure*, and every effort of Alexander and others to *remove Pickering*, the provisional receiver from June, 1874, until the fall of 1875.

It was then made known to the trustee's counsel, that Alexander and his party had joined hands with Cate and his party, and made an agreement by which a new corporation was to be organized, composed of a committee of nine persons, of which these parties were to have six, *and they were to remain in power for the period of nearly six years.*

A decree was agreed to, of which I send you a copy. I have never, I presume you have never, seen its equal. The first-mortgage creditors, the second and third-mortgage creditors, and the general creditors were all to have an interest in the property. When the Cate and Alexander parties, who had been bitter enemies, each in turn kicked the trustee when he would not do their bidding, ceased their warfare, which was for a consideraton, of which I have heard, but not in a manner of which I can now speak!—Sage, Cowdry and Buell, *first-mortgage* bondholders, intervened, took an appeal from the Circuit to the Supreme Court, and gave a bond, which was a supersedeas; when the court, Dillon and Love, saw that this appeal might keep the cause in the supreme court several years and they found themselves burdened with opposition at every term without investigation of the charges against Pickering, and of course without censure of him, they appointed Mr. Grinnell permanent receiver. If Pickering had been anything but a *locum tenens*, the court on Price's report would have been justified in removing him. Just as Pickering was going out of office about the time of, or after Grinnell's appointment, he paid Abbott, Cate, Gilman and Kensett $14,000 rental on engines that Price had reported a year before to be a useless tax upon the property.

From the moment of Pickering's removal, the hate of Cate to Price for the discovery and exposure of his coal monopoly and engine lease, broke out.

Price made a civil enquiry, if the bondholders would sell the road to a local company; and he is charged at once with depreciating, and then seeking to buy the property, and his son-in-law is charged with partiality as a Judge in appointing him as examiner, *at the request of the counsel of the man* who makes the charge.

The supersedeas was disposed of by the Supreme Court, and the order of dismissal filed at Des Moines on the 13th of January last. The ink was not dry on the filing of the order before Cate's attorney (ignoring the right and duty of the trustee to manage his own suit for the benefit of all

the bondholders), orders the master to sell the road under the decree, without consulting the court. Judge Dillon, on application of the master, says, wait until I can consult with Judge Love, whether a *procedendo* is required. He and Love both held, *without delay*, that it was not. The trustee applies to them for instructions as to his duty, and Dillon hurried along the hearing to the inconvenience of his brother judge.

You ask, is there any blame for the removal of Pickering? I answer, no. If there be blame it was in not removing him on receiving Price's report. You will not find any honest man complaining of a court for removing a receiver *who is the appointee and tool of directors, who are sucking out the life-blood of corporations to pay themselves*, coal monopolies and 20 per cent. in rental of over-valued engines. I send you a letter from the master, in which he gives an account in detail from the record of the acts of Judges Dillon and Love, from the filing of the opinion dismissing the supersedeas on the 13th of January, to May court, 1877.

There is another fact explanatory of Cate's great anxiety to get possession of this road. Mr. Horace Abbott has made an affidavit of an interview which he had with me, which no doubt he made at the instance of Cate, but he omitted an important part of the conversation between us. Some years ago Mr. Abbott entrusted me with an important business involving a large sum of money. I so conducted it as to secure his money and obtain his approval and good will. Hearing from a newspaper report that the Iowa Central was defaulting in its interest, and supposing Mr. Abbott to be a large bondholder, I wrote him on the subject. He sought an interview, and told me that he was an *unsecured* creditor to a large amount; that he had lately procured a change in the directory, and his son-in-law, Mr. Cate, was president, and he had appointed Pickering superintendent, *and he expected by the change of management he would get his money; that he did not want a foreclosure.* I should not have mentioned this conversation, but I was not retained, and Mr. Abbott, in an affidavit which his counsel showed me, but did not file, told half the story. The other half explains the assault on a judge by his son-in-law.

If Cate, Abbott and their associates can get the control of this road by a corporation, which gives them power for four years, their unsecured debt will be paid. The first-mortgage bondholders may not be.

There is probably another reason for Cate's assault on Judge Dillon. Abbott, Cate and party have sold large numbers of these first-mortgage bonds to their friends, to charitable societies, to some widows and orphans' estates. They represented, and no doubt honestly believed, them to have been first-class securities, and the purchasers would naturally complain to them, not only of the poor quality of the securities, but of the delays in the foreclosure. And Cate may suppose that he can remove some of the censure from his own shoulders if he can put it upon the judge of the court, who would have granted a decree in 1874 if Cate's attorney had not interposed a *sham defense*. Your obedient servant, JAMES GRANT.

II. LETTER OF L. M. FISHER, ESQ.

The following letter (above referred to) of L. M. Fisher, Esq., the special master in chancery appointed by the court in the case referred to, to hear the various matters of reference connected with the litigation and to sell the road, is reprinted from the columns of the Davenport *Democrat:*

To the Editor of the Democrat:

In reply to your communication of August 1, would say that as master to make the sale in the Central Railroad case, and also in the employ of Judge Grant, counsel for trustees, I am particularly acquainted with everything connected with the proceedings for the sale. I carried on, as master, the correspondence for Judge Dillon; was in constant communication with him as an officer of the court, and also saw all the correspondence between the trustees and its Iowa counsel. I say, generally and positively, that Judge Dillon *has never, directly or indirectly, obstructed the sale of that railroad.* He was always inclined to decide in its favor. He has ever manifested the strongest desire consistent with law to secure the enforcement of the decree, and to remove the property from the hands of the court. He caused the matter of the sale to be heard at the earliest possible date. He heard the case in the absence of Judge Love, at the request of Mr. Ashhurst, counsel for Mr. Cate. He insisted upon the immediate decision of the case. He refused the suggestion of Judge Love to postpone the decision to the May term. He only decided one question without the previous concurrence of Judge Love, and that decision was favorable to Mr. Cate. He referred to Judge Love all the issues in the case except as above stated, without expression of opinion, and followed his decision.

I now proceed to give you a detailed statement of the proceedings as requested, and herein speak only from personal knowledge and written evidence. A judge can not be counsel in a case. And I call your especial attention to the promptness of Judge Dillon's action, and to the way in which he marked out the path for the bondholders to secure and determine their rights.

The supersedeas (stay of execution) granted by Justice Miller was vacated in the supreme court on the 18th of December, 1876. The first intimation the court or master had of a desire of sale by Mr. Cate, or the bondholders whom he represents, *who were not parties to the record or decree*, was given on the 15th of January, 1877. It was a letter from Judge Cole to the master, requesting an immediate sale of the Central Railroad.

This application was accompanied by a copy of judgment entry in supreme court vacating the stay of execution in the case, and also copy of an order of Judge Dillon changing the name of the newspaper, at Judge Cole's request, in which the notice of sale was required to be published. I showed this communication to Judge Grant, counsel for the sole plaintiff in the decree. He declared that neither the court nor any of its officers had any authority to proceed under the decree until a formal *procedendo* (an order to the superior court to proceed with the case) had been issued, and so wrote Judge Cole on the same day. I also communicated these objections to Judge Cole on that day, saying I had doubts on the matter, and that I supposed he would not desire me to sell unless the *trustee* would act under the decree, and further, that the *procedendo* could only be acted upon by the inferior court in term time, which would not be till May, 1877, but that I would cheerfully proceed with the sale if the court should so order.

Judge Cole replied to these letters on the 17th of January, stating that no regular *procedendo* was necessary in this case, and cited telegraphed opinion of clerk Middleton, of U. S. Supreme Court, in his favor, and also saying that the circuit court had not adjourned.

He wrote Judge Dillon on the same day to the same effect, and requested him to order me to sell. My letter was received on the 19th, and was shown to Judge Grant, who still maintained the same opinion on the question of *procedendo*. He, being unable to satisfy me, requested me to consult Judge Dillon, which I did the same day. Judge Dillon said he had just received the above-mentioned letter from Cole, and had written, or would write Judge Love for his opinion upon the question, and directed me to await the latter's reply. I also informed Judge Cole that day, viz., January 19, of a letter written by me on the same day to the Farmers' Loan and Trust Co., trustee, at the suggestion of Judge Dillon, in which, after stating the proceedings had in the case, I formally demanded an expression of the *trustee's* wishes in the matter, as the sole plaintiff in the decree. In this letter to the trustee I said, by special direction of Judge Dillon: "These proceedings are equivalent to a *procedendo*."

On the 22d of January I received a reply from Judge Cole, asking me peremptorily whether I refused to proceed with the sale. I called on Judge Dillon, showed him the letter, and he directed me to await Judge Love's opinion, and I wrote Judge Cole on that day as directed. And here let me say there is no foundation whatever for the construction given by Mr. Cate, in his article in the Springfield *Republican* of July 24, 1877, to the letter of the trustee's attorneys of the 19th of January. On the 15th of January, after my showing him the letter of Judge Cole demanding a sale, Judge Grant called on Judge Dillon and told him of Cole's demand, and that there was no mandate. Judge Dillon said: "Tell Fisher to take no action until the mandate comes down, and not then except by the orders of the trustee, the plaintiff." "It is a grave question for the trustee to sell the property with an appeal from the decree pending." This is quoted from Judge Grant's letter to the trustee. And this is the only letter written by him to the trustee or its New York counsel, between the date of demand for sale and that of Turner to Ashhurst, quoted by Mr. Cate.

And the above is the only reference to any opinion expressed by Judge Dillon. By mandate, Judge Dillon meant, as shown by his directions to me of January 19, and

his decision hereafter given, merely properly authenticated evidence of the supreme court's judgment. What was properly authenticated evidence he did not then decide, for the question was not before him. It did come before him four days after. He then intimated his opinion by the directions as to my letter to the trustee, but reserved his formal decision until he heard from Judge Love. Upon hearing from him he decided the question immediately, and completely overruled the position taken by Judge Grant and the trustee. At the time of this conversation Judge Dillon did not know that a certified copy of the judgment was filed in the circuit court, and had no evidence of the supreme court's decision.

A trustee representing conflicting interests is in law the ward of the court, and is entitled to ask and receive the advice of the court. On the strength of Judge Grant's statement of the 15th of January to Judge Cole, that neither the court nor master had any authority to sell, R. L. Ashhurst, Esq., president of the joint committees of the bondholders, wrote H. B. Turner, New York counsel for trustee, accusing Judge Grant of obstructing the execution of the decree. Turner, on the 19th of January, in reply, after at length stating the gravity of the questions presented to the trustee, and defending the position of Judge Grant, says sarcastically: "Pardon me, when I say with the best feeling toward you personally, that it seems to me that when you know that the course of Judge Grant, which you criticise as the obstructive course of the trustee, was pursued under the special direction of Judge Dillon, you may consider your remarks hasty. This, the only founda tion for Mr. Cate's statement that Turner, Lee and McClure had stated that 'trustee was obstructed in so doing (executing the decree) by special instructions from Judge Dillon.'" Judge Dillon, on the very date of Turner's letter, of his own motion directed me to inform the trustees that the "proceedings taken were equivalent to a *procedendo*," and to request its action in the case. Did that show a disposition to obstruct the execution of the decree?

Nothing further was done in the case until Judge Dillon, on the 27th of January, handed me the following communication, to which was attached Judge Cole's letter to him of January 17, 1877, which has since been in my possession:

KEOKUK, IOWA, January 22, 1877.

"DEAR JUDGE—Yours of the 20th received. It seems to me that the case to which you refer now stands just as if there had been no supersedeas, and that whatever the court could have ordered if there had been no supersedeas it may now order without a *procedendo*. I presume the court above would not interfere with the discretion of the court below in the *execution* of its judgments and decrees, except in a proper case by mandamus, and, therefore, that a *procedendo* would not be the appropriate writ in a case like this. To your first question, therefore, I answer that I do not think a *procedendo* necessary.

To the second I say I certainly would make no order on any such application as Judge C. presents. There seems to be no *necessity for any great haste*, and *certainly none* is shown. Further, in my opinion, *the trustees* are the proper parties to move for such an order, and I understand you to say that Judge C. does not represent *them*. As you say, the appeal being retained, it might possibly complicate the matter to make an order on the trustees to sell. This, at all events, is worthy of your consideration, and I certainly think the trustees ought to be heard if their discretion respecting the sale is to be interfered with.

(Signed) "Yours truly, J. M. LOVE."

Endorsed: "L. M. FISHER, ESQ., Special Master."

"I concur in these views of Judge Love, and send you this for your guidance in the matter, which you are at liberty to communicate to Judge Cole and any person interested. JOHN F. DILLON.

"January 25th, 1877."

I immediately sent copies of this communication to Judge Cole and Isaac M. Cate.

Judge Dillon thus set the ball in motion. He had the trustee officially requested to proceed, and thus prepared the way for an order to sell.

The next proceeding was the service on me, the 10th of February, 1877, by Judge Cole, of a motion for my attachment for contempt, in not executing the decree. I immediately took the motion to Judge Dillon, who forthwith wrote to Clerk Mason not to issue the attachment without an order therefor from one of the judges of the court. He here again showed the bond-holders how to proceed. "Apply to the court."

On the 12th of February, the trustees having, in consequence of the foregoing opinion of Judges Dillon and Love, and the service of a request by a portion of the bondholders to execute the decree, and protest of another portion against its action, filed its petition for the advice of the court.

Judge Dillon immediately ordered me to send the original petition to the clerk and a copy to Judge Love. He further indorsed an order on the petition that all the counsel be notified of the same by the clerk forthwith. After receiving notice of this application, the bond-holders represented by the New York and Boston committees, and Mr. Cate, applied to Judge Dillon for an order on the trustees to sell. Judge Dillon forthwith, on the 22d of February, 1877, ordered a hearing on both the application of the trustees and the order for sale at Davenport, on the 3d of March, and directed me to give notice of the same.

He not only fixed the earliest possible day for the hearing before himself and Judge Love, but was so anxious for a speedy and thorough disposition of the case, that he required me to *telegraph* the notice to the Eastern counsel for the various parties. He also required me to send notices by mail to the same and the Western counsel.

Judge Dillon, in the order, so as to avoid all possible delay, and secure on the part of counsel complete preparation for the hearing, required the contending parties to serve each other with copies of all papers to be used at the hearing before starting for Davenport, except the records and files of the court.

It was not convenient for Judge Love to attend on the day named, and he wished to have the day for the hearing postponed. Judge Dillon refused to do this, and urged Judge Love to be present on the day named, who consented. When the day for the hearing was reached, viz.: March 3d, 1877, Judge Love telegraphed that he had missed the train. This was on Saturday. Judge Dillon informed the counsel present—being Judge Grant and H. B. Turner, Esq., representing the trustees, and R. L. Ashhurst, Esq., and Judge Cole, representing the bond-holders desiring the sale,—that he was personally desirous of having Judge Love sit with him in the case, whose counsel and assistance in determining the important matters at issue he wished, but if the parties desired would nevertheless hear the case alone. Mr. Ashhurst desired to proceed, and Judge Dillon complied.

After the argument, Judge Dillon in their presence wrote a statement of the issues, and submitted it without comment to the counsel above named, who pronounced it correct. This statement of the case was directed to Judge Love, and concluded with an urgent request to send him his opinion without delay, so that any parties aggrieved in the decision might have an opportunity to obtain a speedy hearing before the United States Supreme Court.

The communication, together with all the papers in the matter was given to me by Judge Dillon, and was by me sent as directed by him to Judge Love.

The opinion of Judge Love reported in the July Western Jurist and 5 Central L. J., p. 56, was given in response to the communication. Judge Love therein says in addition to what was published: "Perhaps, if you feel any embarrassment in regard to the matter, you might consider the propriety of reserving your determination till the regular term in May. Judge Dillon refused to listen to this suggestion, but immediately wrote his own opinion, reported in the same publications, and ordered me forthwith to send the opinions of himself and Judge Love to the clerk for filing and to inform the counsel of the decision. This haste was used in order to give Mr. Cate's party an opportunity to secure immediately from the United States Supreme Court, then in session, a mandamus to compel the Circuit Court to execute its decree in case of an erroneous decision. Do these acts look like obstructing the execution of the decree? Judge Dillon simply decided that the trustee had a direction, which on account of the grave circumstances of the case the court would not control. Had he decided otherwise his decision would have been reversed. Would the parties then be in as good a position as to-day, when the sale has been made under his advice to the trustees at the May term? He overruled every dilatory objection raised by the opposition to the sale. He hastened in every way the hearing of the case. He sought invariably the advice and concurrence of Judge Love.

He received it, and more too; for Judge Dillon seemed always more favorable to a sale than Judge Love. The above was the only question of the sale decided by him adversely to Mr. Cate's party. It is sufficient to say that in this he has the unanimous concurrence of both Judge Love

and of the judge of the Supreme Court of the United States. I challenge any member of the bar to name a chancery case where matters so complicated and involving such large and hostile interests were ever so speedily disposed of; where the rights of parties were ever more zealously protected than those of the very persons who now so outrageously assail him. If Judge Dillon showed any partiality it was in favor of the sale.

He began the proceedings of his own motion, which led to the prompt decision of the case. To those who know him this statement of the case is wholly unnecessary. His judicial life constitutes, far more than this record, his vindication. Both the Iowa counsel for Mr. Cate and the bondholders, Judge Cole and Mr. Boardman, have declared to me that these charges are infamous. I deem it not only my duty, but a privilege, to give this testimony in behalf of the truth. Very respectfully, yours,

L. M. FISHER.

III. LETTER OF HON. HIRAM PRICE.

We reprint from the Davenport *Gazette* the following manly and pointed letter of Hon. Hiram Price, whose name has been most wantonly connected with the slanders against Judge Dillon:

Editor of the Davenport Gazette:

My attention has been called to certain charges recently made and circulated in some eastern papers and in a pamphlet, reflecting in severe terms upon Judge Dillon for certain decisions and acts of his in reference to the Central Railroad of Iowa. The same articles use my name in such a way as to convey the idea that I am, or was, an interested party, and not above suspicion of wrong-doing therein.

It is not my practice, as you may know, to trouble the public with newspaper articles about myself, trusting to the people among whom I have lived for thirty-three years, and who know me, to do me justice. But these slanderous articles have been given wide circulation, and are read by people who have no means of knowing whether they are true or false. This fact, in connection with the other fact, that they are calculated to injure others, has determined me to depart from my usual custom, and give through your paper a plain statement of all I have ever had to do, directly or indirectly, with that railroad.

In the winter of 1874-5, while I was in the State of Georgia, having gone there with my wife to remain until spring, I received, very much to my surprise, a notice saying that I had been appointed to examine the books and accounts of the C. R. R. of Iowa, and report whether, in my judgment, the affairs of the company were being judiciously and economically managed, and that it was necessary that there should be as little delay as possible. I started at once, proceeded to Marshalltown in Iowa, made the examination during as severe cold weather as is often found in that northern latitude; wrote an itemized and detailed report, making such suggestions and recommendations as in my judgment would, if adopted, increase the net earnings of the road about $70,000 per annum. This is the extent of my connection with that railroad or its affairs. "Only this, and nothing more." My report was printed under the direction of Judge Grant, who, I believe, was the attorney for the trustee, and copies given to all who wished them.

I had never had anything to do, directly or indirectly, with this railroad until that time. My appointment was a complete surprise to me, and when I inquired how it come to be made, I was informed that, after several other names had been proposed and objected to by one side or the other, the attorneys on both sides unanimously agreed upon me as the person. The only reason of which I can conceive for their doing so, is that they supposed my thirteen years experience in railroad offices, building and operating railroads, would necessarily qualify me to some extent for the work. For my services and expenses I made no charge, leaving it to the attorneys on whose motion I was appointed, to fix that, and I returned at once to Georgia. The compensation allowed me was three hundred dollars, out of which I paid my expenses in a journey of over 2,000 miles, and that amount was fixed by the attorneys, and *not by the Court*.

These assassins of character do not attack my report, and yet I have good reason to suppose that two items in that report furnish the fuel to feed the flames which make their wrath burn so intensely. In my examination of the books and accounts of the company I discovered the existence of two rings of leeches, who were sucking the life-blood of the company, and, of course, I recommended that they be choked off. They should have been compelled to disgorge their ill-gotten gains, but I suppose there was no legal power to do that; and now, because they can no longer grow fat at the expense of the railroad company, they must vent their spite on some one; hence these newspaper articles, sent broad-cast over the land.

I never owned one dollar of either the stock or bonds of that railroad, nor had I ever any interest of any kind in it. I never recommended the appointment of Mr. Grinnell or any one else as receiver, and never heard one word on the subject until after he was appointed.

The insinuation that I wished to purchase the road is so ridiculous that those who know the facts would not consider it worth one word of reply. The only thing out of which this could have been manufactured, is, that some gentleman asked me (as I have been asked in reference to the Peoria railroad, the Davenport & St. Paul and other roads) whether I would be willing to be one of a company to purchase this road; saying that they thought in time it might be made to pay a fair percentage on the investment. My reply was (as in other cases), that if it could be bought for what it was worth, and the men forming the new company such as would work in harmony together, I would not object to being one; but I stated most distinctly to those gentlemen who spoke to me on the subject, that I had no idea that anything of the kind could be done, and I certainly never gave the matter one hour's thought. The only persons who ever spoke to me on the subject were gentlemen having interests and property on and along the road. I have none, and never had. There has been no word or act of mine in reference to this matter that I am not willing to say or do, to any stockholder or bondholder of that road.

One word to those who inspired those newspaper articles and I close this article.

The man who enters my house when I am asleep and takes my property is a thief. The man who meets me on the highway and with bludgeon or revolver compels me to give him my money is a robber; and both of these if caught will go to the State's prison. But both these are gentlemen in comparison with the men who, with the stealthy step of the midnight assassin, stabs the reputation and steals the character of another. The first two have some courage, and take some risk. The last is a coward in addition to being a scoundrel. The first two might lay some small claim to associate them with the lion; the last would pertake more of the character of the hyena.

H. PRICE.

OCEAN GROVE, N. J., July 28, 1877.

IV. RESOLUTIONS OF MEMBERS OF THE BAR OF NEBRASKA.

On Tuesday of last week a numerously attended meeting of members of the bar of Nebraska was held at Omaha, to take action with reference to the charges against Judge Dillon. Among those present (including several distinguished citizens not members of the bar) were the following gentlemen: Gen. Charles F. Manderson, City Attorney of Douglas County; United States Marshal William Daley; Col. Watson B. Smith, Clerk United States Court; Dr. Geo. L. Miller, J. M. Woolworth, E. Wakeley, Geo. W. Doane, A. J. Poppleton, John D. Howe, G. W. Ambrose, John M. Thurston, A. Swartzlander, J. C. Cowin, E. F. Smythe, W. J. Connell, Geo. E. Pritchett, Wm. L. Peabody, E. Estabrook, Clinton Briggs, J. I. Redick, J. C. Crawford, Robt. Kittle, James Neville, J. L. Webster, and others.

Speeches were made by many of the gentlemen, all expressing the utmost confidence in the judicial integrity of Judge Dillon; and the charges against him were condemned as baseless libels.

The following resolutions were submitted and adopted without a dissenting voice:

WHEREAS, Certain newspaper assaults have been recently made and widely published, reflecting upon the judicial action of Hon. John F. Dillon, judge of this circuit, in the Iowa Central Railroad case, tried and determined in the United States Circuit Court in Iowa;

Therefore, we, the members of the bar of Nebraska, do resolve and declare as follows:

First. That Judge Dillon's long and distinguished career, and especially his labors for many years past upon the bench of this district, of which we have been personal witnesses, have established for him a reputation for judicial purity, impartiality and fairness, as well as for signal ability, wide learning and unwearied industry, which should protect him from wanton attacks or unjust criticism.

Second. We have unwavering confidence in Judge Dillon's absolute integrity, fidelity, and conscientious devotion to duty, and no attack upon his judicial conduct, unsupported by facts and proofs, can shake or disturb this confidence.

Third. So far as the facts in regard to his judicial action in the matter in question have come to our notice, and especially in view of the ample and complete refutation of these charges made by Judge Dillon's published letter to Thomas C. Reynolds, Esq., of the St Louis bar, we believe that the assault was not only wholly unjustified, but intentionally unfair and malicious.

Fourth. Recognizing the right of just and fair criticism of all official action, yet we should regard it a calamity of unmeasured extent if the confidence of this circuit, and of the public generally, in the pure and impartial administration of justice by this distinguished jurist, should be impaired or lessened; and we denounce any unfounded aspersions upon him, or upon any judge administering the law with learning, rectitude and conscientiousness, as a high crime against justice and the public weal.

Fifth. We request His Honor, Judge E. S. Dundy, when next sitting in circuit court, if he shall deem it appropriate, to direct these resolutions to be placed in the archives or spread upon the records of the court.

V. LETTERS FROM OTHER COUNSEL IN THE CASE.

We reprint from the Davenport *Gazette* the following letters to Judge Dillon from two of the leading counsel for the bondholders in the suit which has given rise to the slanders against him.

MARSHALLTOWN, IOWA, July 21, 1877.

Hon. John F. Dillon, Judge of the United States Circuit Court (Iowa):

DEAR SIR:—While in Boston last week I saw a copy of *The Nation*, and observed with pain that the motives of the Court in the matter of the C. R. R. of Iowa were questioned. I beg to assure you that, so far as I am informed, no one of the committees or counsel have aided or abetted such criticisms. I am personally knowing, that R. H. Ashhurst, chairman of the New York committee, and H. J. Boardman, chairman of the Boston committee, are indignant at the wrongfulness of the inuendoes. I am personally knowing to facts which contradict some of the insinuations, as, for example, I well remember Hon. H. Price was appointed commissioner against your desire, but at the request of counsel for both parties. I have at all times and in all cases regarded and believed your rulings and those of Judge Love to be able and sincere, rendered in utmost good faith, and no one more than myself deprecates the unjust and false pretenses that seem, so far as I can judge, to emanate from some disaffected bondholder in Maine. I remember my oath as attorney, "to maintain the respect due to the courts of justice and judicial officers," and in pursuance thereof properly may and will make any effort, regarded expedient, to correct false impressions put forward by irresponsible and unknown parties.

Please acquaint Judge Love, if you should regard this of any importance to him. Yours respectfully,

H. E. J. BOARDMAN.

MINNEAPOLIS, MINN., July 26, 1877.

Hon. J. F. Dillon, Davenport, Iowa:

DEAR SIR:—I have been spending the last month at different points in Minnesota, and to-day, for the first time, have noticed that attacks have been made upon you, in some of the public prints, for your alleged rulings in connection with the Central Railroad of Iowa foreclosure.

I can not conceive the motives that would lead any one, who has the smallest interest in this case, to coin and publish such utterly baseless misstatements. To those who know you, no explanation or defense is needed.

I was interested as counsel in the cause from the beginning of the foreclosure proceedings, and took an active part therein up to the time of the appeal to the Supreme Court, and know that *every one of the charges made are wholly false.*

The mortgages sought to be foreclosed against the railroad company by the trustee, the Farmers' Loan and Trust Company, expressly provide that, in the event of a foreclosure, the trustee should buy in the property and organize the road, according to such plan as might be adopted by a majority of the bondholders.

The contending factions among the bondholders did not at first agree upon any plan of reorganization, and the trustee was left, therefore, without guidance in this particular. Finally, a plan was provided that met the approval of the large majority of the bondholders, and a decree embodying the plan adopted was submitted to the court, and, after a full hearing, was understood to be approved by all interested, and in that belief was signed by the court and ordered of record. Subsequently the holders of $200,000 of bonds objected to the decree, and desired to vote an appeal. The questions, whether parties interested in the action, but not appearing of record as parties to the suit, could be allowed an appeal, presented a novel question, but it was not one that was raised by the action of the court. Like any other question presented, it was decided, and the decision and action of the court thereon having been approved by the supreme court, there remains no doubt of the legality of the ruling. In regard to my personal views of the matter, I can only say that the action of the court seemed to me then wholly beyond exception, and subsequent reflection has only served to confirm this opinion. As an attorney in the case, I should have been pleased with a ruling that would have prevented an appeal being allowed; but, as a member of the bar, who recognized the duty of the court to protect the rights of all, I was and am satisfied that the rulings of the court were equitable and impartial.

As to the charge, based upon the removal of D. N. Pickering from the position of receiver, and the appointment of Hon. J. B. Grinnell, it is wholly without foundation. I believe that Mr. Pickering was an honest and capable man, fully competent to discharge the duties of his position, and I earnestly desired to have him retained in that capacity; but it was clearly evident that he was personally very much disliked by one of the warring elements among the bondholders, and various charges were made against him, supported by numerous affidavits. Under these circumstances, when it became apparent that the final disposition of the case was to be indefinitely prolonged by an appeal to the Supreme Court, and when it was also apparent that the attacks on Mr. Pickering would be continued, the court, in the interests of peace and in the hope that harmony might thereby be restored among the parties interested in the road, removed Mr. Pickering and appointed Mr. Grinnell. The position of the court in regard to this question of receiver was eminently one wherein—

"You are damned if you do,
And you are damned if you don't,"

by such of the parties in interest as failed to see that it was not the duty of the court to fall in with the wishes of either faction, but rather to see that the rights and wishes of both parties were, as far as possible, protected.

So, also, as to the matter of the appointment of Hon. Hiram Price as a commissioner to examine the report of the receiver, etc., *the court is blamed without reason.* The selection of Mr. Price was not made by the court, but wholly by the counsel representing the different interests. I was at Davenport with Mr. Boardman and Mr. Duncombe, representing the bondholders. At an interview of the counsel, Judge Grant, representing the trustee, proposed Mr. Price as a commissioner. Other names were suggested, but upon deliberation it was agreed that Mr. Price should be recommended to the court as a gentleman satisfactory to *all* the parties interested, and upon this recommendation the appointment was made, and the credit for it should be given to counsel, and not to the court.

When I sat down to write this letter, I only intended to write a brief note, expressing my regret that calumnies so baseless and uncalled for should have been set afloat in the public prints, but I find that I have written, perhaps, a longer letter than you will care to read, but I shall let it go as written, and subscribe myself,

As ever, your sincere friend, O. P. SHIRAS.

VI. LETTER OF HON. H. H. TRIMBLE, PRESIDENT OF THE IOWA STATE BAR ASSOCIATION.

BLOOMFIELD, IOWA, July 30, 1877.

Prof. W. G. Hammond, Chancellor of the Iowa State University:

DEAR SIR:—I acknowledge the receipt of yours of the 25th inst., in which you call my attention, as President of the Iowa State Bar Association, to a libelous, wicked and unjust assault on Hon. John F. Dillon, of the U. S. Circuit Court, made by the New York *Nation*, and re-published by other journals. I note your suggestion that the Iowa Bar Association owes it to itself, as also to Judge Dillon, one of its most honored and distinguished members, to vindicate him. I concur fully with you, and regard the assault as an

attack on the honor and good name of the bar of the state. I have no express authority to speak for the association in this matter, and yet I am quite sure that any word I may utter in defense of Judge Dillon will meet a most hearty approval by every member of the association, and by every honest man in Iowa. The character of a man like Judge Dillon ought not to be lightly spoken of or assaulted, without the very gravest reasons. There is an abiding conviction in the hearts of the people of Iowa, that no more upright and pure man lives than John F. Dillon. He takes no part in politics. His whole life, with his great energy and talents, is donated to his chosen profession, that of law. By his industry, talents and learning, and no less by his independence and integrity, he has shed luster upon the Federal bench. Long years since he abandoned the usual avenues that attract ambitious and talented men, and that lead to wealth and power, and commenced a life of toil on the bench—toil such as few men have the courage to encounter—toil where almost the only reward to be hoped for was the name of an able and honest judge. He has labored with a zeal, perseverance, and close application seldom surpassed, and by his labor has gained a name in which his brethren of the Iowa bar take a just pride. Knowing these facts, we feel that there can be no possible justification for an assault on such a man, except the stern demands of truth and justice. In this sense, was the assault on Judge Dillon justified? On this point I should be inclined to enter somewhat into details in his defense, but for the fact that since reading your letter I have read in the CENTRAL LAW JOURNAL a communication from Judge Dillon himself, giving a history of the case referred to in the libelous article—"The Iowa Central foreclosure case." This history is taken from the *records* in the case, and constitutes a most complete and triumphant vindication. Not only is the substance of the records given, but the very place where the records, in an authentic form, can be found, is pointed out, book and page. The truth of these records being admitted, the vindication is complete. Their truth can not be questioned. After reading Judge Dillon's letter, and learning the plain, unvarnished facts of the case, it seems strange that any man with sufficient intelligence and culture to write the libelous article in question, could be bold enough and malicious enough to fabricate such a series of lies on any decent man. It is a pity that journals of national reputation, and ordinary pretensions to decency, should lend themselves to the purposes of such bold and malicious calumniators. If Judge Dillon were a politician, no notice would probably be taken of such assaults, except by his political friends; but in view of his life—a life well known to us all—I deem it the duty of every member of the Iowa bar to resent this assault as a personal affront to himself—to denounce it as a malicious falsehood, and give public expression to his feelings. For this purpose and in this spirit I write, knowing that what I have written will meet the unqualified approval of all our brethren of the association.

I am, dear sir, very truly your friend,

H. H. TRIMBLE.

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

January Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

EXEMPTION OF HOMESTEAD—EQUITIES OF MORTGAGOR.—1. A and wife executed a mortgage to G. on their homestead and other real estate. Subsequently D. obtained a judgment against A. After A.'s death his wife and children continued to occupy the homestead. G. foreclosed his mortgage, and in the decree, with his consent, it was ordered that the real estate, other than the homestead, be first sold. L., who was a party to the foreclosure proceedings, objected and insisted that the homestead be first sold. *Held*, that there was no error in the order, and that the equities in the family of the mortgagor in the homestead were superior to the claims of the judgment-creditor. Judgment affirmed; all the justices concurring. Opinion by BREWER, J. *W. J. La Rue, Sr., & Co. v. Wm. L. Gilbert et al.*

FOREIGN JUDGMENT—SUIT ON NOTE GIVEN FOR PRICE OF LAND.—1. The recitals of a judgment obtained without personal service in a sister state, and by publication, where none of the defendants to the suit make any appearance in the court rendering the judgment, are no evidence of debt, nor tender of a deed, in a separate action pending in this state between the same parties, to recover upon a promissory note. 2. Where a note is given for the price of land, under a contract, that if the note is paid at maturity the payee will convey the land to the maker, the law requires a tender of a conveyance of the land in order to maintain a suit upon the note given for the price of the land. Opinion by HORTON, C. J. Judgment reversed. All the justices concurring.—*Iles v. Elledge.*

LICENSE TAXES—"AUCTIONEER" AND "AUCTION" DEFINED.—1. There being no special restriction thereon in the constitution of this state, the legislature may confer upon municipal corporations the power to tax employments as well as property. 2. Section 48 of chapter 60 of laws of 1871, which in terms authorizes cities of the third-class to levy and collect a *license tax* on certain occupations was designed for purposes of revenue rather than of police regulation, and authorizes a tax on those occupations. 3. Whether it be true or not that a license tax falls within the general rule of taxation, that it knows no other limit than the discretion of the taxing power, it can not be doubted that before an ordinance of a city authorized to collect license taxes should be declared void on account of the amount of the license, it should appear that an unjust discrimination has been made against the business licensed by casting upon it an undue share of the expenses of the city government; for, though the license tax be large, *non constat* but that all other occupations and property are proportionately taxed. 4. In cities of the third-class, *i. e.*, cities containing not more than 2,000 inhabitants, and in which it is matter of common knowledge that permanent auction stores are scarcely ever found, a license tax of five dollars a day for sales by auction is not so high that courts can adjudge it void as unreasonable and oppressive or in restraint of trade. 5. A provision in the statute that license taxes "shall be at such rate per year as shall be just and reasonable," does not render void an ordinance requiring in case of auction licenses the payment of so much "for each day of the continuance of such auction." 6. In the first section of an ordinance it was provided that "before any person shall proceed to sell at public auction * * * merchandise of any class whatever, he shall first obtain a license for an auction," &c., and in the second that "any person desiring to exercise the office or calling of an auctioneer * * * shall first obtain a license therefor," *held*, that there was no identity between these two sections in the subject-matter of the license; that the first refers to the party who has goods which he is seeking to have sold by auction, and the second to the party by whom the outcry of the sale is to be made. Opinion by BREWER, J. Judgment affirmed. All the justices concurring.—*Fretwell vs. Bailey et al.*

PETITION—PROVINCE OF THE COURT AND JURY—SEVERABLE CONTRACT.—1. Where a petition sets forth a copy of a contract, of the date of November 5th, 1870, between H. & M., of the one part and U. of the other part, whereby H. & M. are to re-set, cultivate and complete a hedge upon three sections of land, and to so cultivate and maintain it in such a skillful manner that the same shall be sufficient to turn ordinary stock, and become such a fence as is contemplated by the laws of the state, and so that, when completed, it will divide the sections of land into quarter sections, and for the said work, labor and the maintaining and cultivating of such hedge, U. is to pay H. & M. $1,000, on July 1st, 1871, $500 on July 1st, 1872, and, upon the completion and turning over of the hedge to U., H. & M. are to receive another $1,000, or the third thereof, on the completion of the hedge upon a section, as the case may be, and the petition alleges that H. & M. continued during 1871, 1872, 1873, to June 24th, 1874, to cultivate, train, plash and furnish plants, as agreed, and that H. & M. performed the said contract and had grown on the land a good fence, such as is contemplated by the laws of Kansas, except on *the wet* and *seepy* ground, and where U. had destroyed the same, and that there was, at the filing of the petition, a good and lawful fence of over sixteen miles in length of hedge on the land, planted and grown by the labor, skill and materials of H. & M., and which said petition further states in detail the acts of H. & M. in performing their contract, that said work, labor, care, diligence and materials are and were when furnished and bestowed of the value of

$3,500, the payment of U. of the first $1,000, in August, 1871, and the refusal of U. to make any other payments, and sets forth certain acts of omission and commission of U. whereby H. & M. were prevented from completing the hedge, as agreed, and the said petition contains the proper prayer for relief, *held*, that the petition states facts sufficient to constitute a cause of action in favor of H. & M. against U.; and, *held*, also, that the contract did not require the cultivation and maintaining of the hedge on such portions of the ground as were so wet and seepy as to render the growing of a hedge thereon an impossibility, as the law does not require a party to a contract to perform impracticable acts, which could not have been expected or contemplated by the parties when the contract was made, and the effort to perform which would be palpably absurd; and, *held*, further, that the district court did not err in everruling the motion of U. to compel H. & M. to make such petition more definite and certain, so that it should appear whether H. & M. sought to recover the contract price for the performance of the contract, or on a *quantum meruit* outside of the contract, as the allegations of the petition were sufficiently definite and certain to fully inform U. of the precise nature of the claim against him. 2. The jury are the sole and exclusive judges of the facts, from the testimony in the case, and the district court has no right upon controverted questions, where there is a conflict of evidence, to suggest or dictate to the jury the answers to particular questions of fact submitted to them for findings thereon; and, *held*, that the court below erred, when the special findings of fact returned to the jury were inconsistent with the general verdict, in taking the special findings into its own hands and changing materially the purport of such findings, and writing other questions and answers thereto, and then submitting the same for the signature of the foreman, and thereby making the general verdict and the special findings agree. 3. The contract above stated is a severable one, and not an entire and indivisable one; and, *held*, that if H. & M. were prevented from completing the hedge by the wrongful acts of U., they could recover and invoke the contract for the purpose of determining the measure of their recovery, and if H. & M. have been guilty of committing a breach of the contract, H. & M. can recover for their part performance, in accordance with the contract price, but their claim will be subject to all damages resulting to U. from a non-performance of the agreement by them, which would include a consideration of the amount necessary to enable U. to have the contract completed and carried out according to the original intention of the contracting parties. Judgment reversed. All the justices concurring. Opinion by HORTON, C. J.—*John P. Usher v. Oliver S. Hiatt and Charles F. Morris.*

PARTNERSHIP PROPERTY—POSSESSION AS NOTICE OF TITLE—JURISDICTION OF PROBATE COURT—MERE IRREGULARITIES DO NOT AVOID AN ADMINISTRATOR'S SALE.—1. Where L and B were partners together in 1857 in the transaction of a general real estate business, and in June of that year they purchased real estate in the territory of Kansas for the firm, paid for it with the firm money, and entered the same on the books of the firm as assets of the firm, and afterwards paid the taxes thereon with firm money, and both parties treated the lands as partnership property; *held*, that although the legal title of the real estate was taken in the name of one of the partners only, the equitable title would be in both partners according to their respective interests. 2. Where a partnership of the character above described is dissolved by the death of one of the partners, and the legal title of the real estate of the firm in which both partners have equal interests, is, at the death of the partner, in such deceased partner, and upon due proceedings had by administration, the undivided half of the real estate belonging to the intestate is purchased by "V" at an administrator's sale, and such grantee also obtains the equitable interest of the surviving partner to the real estate by deed, and thereupon conveys said land by warranty deed to C, who takes immediate occupation of the premises, makes valuable and lasting improvements thereon, pays taxes assessed against the land, and has open, notorious, unequivocal, and exclusive possession of the real estate, under an apparent claim of ownership; *held*, that where the deeds to V and C have all been duly recorded, *that* a purchaser buying of the sole heir at law of the deceased partner the said real estate, is charged with notice of whatever claim the possessor asserts up to the date of purchase, whether such claim is legal or equitable; and *held*, that such purchaser, so buying of the heir at law of the deceased partner, obtains no title which can be asserted against C in the possession of the premises. 3. Under section 2, laws of 1859, 10, the probate court of any county in the territory of Kansas, in which was situate lands belonging to an intestate, had jurisdiction to grant letters of administration, upon proper application being made, on such estate of the intestate, although the deceased died out of the territory and had at his death a mansion-house or place of abode in another state. 4. The application for letters of administration under the laws of 1859, sections 11 and 12, p. 11, is sufficient, if in writing, stating the names of the heirs of the deceased, and showing that the applicant was sworn to the affidavit by the clerk of the court, although the applicant's name is written below the jurat, and in other respects the application is informal. 5. The acceptance and approval of the bond of the person to whom letters of administration were granted on May 5th, 1860, by the written endorsement thereon of the probate judge, when such bond was signed by the administrator and one surety only, and the surety at the time was governor of Missouri; *held*, not to invalidate a sale of real estate made by such administrator, after the report of sale has been approved by the probate court and the administrator has executed, acknowledged and delivered to the purchaser a deed therefor containing the statutory recitals as provided in section 141, laws 1859, 29. 6. Where an application was made by a creditor on November 5th, 1860, to the probate court, praying for an order of sale of the real estate of an intestate, which was signed and sworn to by such creditor, and contained a statement of the debts of the estate in the aggregate, and set forth that the personal property belonging to the estate was insufficient to pay the expenses of the administration; that the debts could not be paid without selling the interest of the intestate in the real estate described in the petition and of which application the administrator had verbal notice prior to the presentation of the same; *held*, that such application was sufficient to authorize notice to be given thereof and to issue an order to sell real estate on proof of publication of notice made to the court, and upon hearing of the testimony in the matter, and no objection being made thereto. 7. The law required notice to be published, that unless objections be shown to the contrary on the first day of the *next term* of the court, after an application was made to sell real estate to pay the debts of an estate, that an order would be made for the sale. The application was made in November, 1860. The *next term*, by the law, commenced the first Monday of January, 1861—January the 7th. The notice stated that the objections must be shown on or before the January term of the court, to be held on the 1st day of January, 1861. The hearing on the application was had at the regular January term, 1861. The notice was dated November 9th, 1860; *held*, the notice could not have misled; and, *held*, not to invalidate the sale. 8. Under section 142, laws 1859, 29, 30, an administrator's deed is evidence of the facts therein recited, and all the recitals required to be contained therein by section 141, of laws of 1859, 29, which are set forth in the deed, are *prima facie* true, without further proof. Judgment affirmed; all the justices concurring. Opinion by HORTON, C. J.—*Johnson v. Clark.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT, " SETH AMES, " MARCUS MORTON, " WILLIAM C. ENDICOTT, " AUGUSTUS L. SOULE, " OTIS P. LORD, } Associate Justices.

EQUITY—DISCONTINUANCE—FRAUD.—1. Where a bill in equity is brought against two defendants and the plaintiff discontinues as to one, the case stands as if the bill had been originally brought against the other one alone. 2. A mortgagor who conveys his right in an estate to a third person can not transfer to such person any right of action which he may have had against the mortgagee for deceit or fraud in procuring the mortgage. Fairfield v. McArthur, 15 Gray, 526. Opinion by MORTON, J.—*Foster v. Wightman.*

STATUTE—CONSTRUCTION.—Under the Stat. of 1866, ch. 172 (extended by Stats. 1870, ch. 339; 1872, ch. 324; and 1874, ch. 330), authorizing treasurers of cities or towns, under the direction of the city council or selectmen, to make monthly payments, to be reimbursed from the state treasury, to certain soldiers and sailors, and providing that "all persons entitled to aid under the provisions of this act, who do not apply for the same within three months from the passage hereof, shall not receive said aid prior to the date of their application," it was *held*, that a town can not legally vote "back state aid" to one who received aid in 1862 and 1863, and afterwards made no application for such aid till January, 1875. Opinion by MORTON, J.—*Cusick v. Brookline.*

MORTGAGE OF PERSONAL PROPERTY—EQUITY OF REDEMPTION.—A sold goods in a certain building to F, and took a mortgage upon the same to secure $800, according to four notes, none of which were paid. Upon A's death, shortly before the last note became due, his wife E, the defendant, was appointed his executrix. F gave E a new mortgage, for the same debt and to the same amount, covering a large part of said goods and others added by himself, and E gave up the old notes. F executed a bill of sale of the property included in the mortgage to E to P, who executed mortgages thereon to D & S. D & S, the plaintiffs, had notice that a mortgage or mortgages to said amount had been given to E. *Held*, according to Howard v. Chase, 104 Mass. 249, that the plaintiffs took only a right to redeem, and that their mortgages, though recorded first, did not take precedence of the mortgage to defendant. Opinion by MORTON, J.—*Pecker v. Silsby.*

WILL—OMISSION TO PROVIDE FOR CHILDREN—INTENTION.—1. Upon the issue as to whether an omission by a testatrix to provide for her children in her will, which gave her whole estate to her husband, was intentional, parol testimony tending to show the intelligence of the testatrix and her relations to her husband and children, at the date of the will and time of her death, was clearly competent. Converse v. Wales, 4 Allen, 512; Ramsdill v. Wentworth, 101 Mass. 125. 2. It appearing in evidence that the testatrix was a woman of great intelligence and capacity, that she was very fond of her children, who were of a tender age and were separated from her, that she had great affection for and the most perfect confidence in her husband, and that he was very devoted to her, the presiding justice was justified in finding such omission was intentional, and not by accident or mistake. Opinion by MORTON, J.—*Buckley v. Gerard.*

DEED—PAROL EVIDENCE—MONUMENTS.—1. A conveyance of land can only be by deed, and parol evidence is not admissible to control or vary a deed. If the description in it is certain and unambiguous, it is not competent to prove that the parties had any intention different from that expressed. 2. But if, upon applying a deed to the land, it is found to be ambiguous, parol evidence of the surrounding circumstances and of the acts of the parties is competent to aid in the interpretation of the deed, and to enable the court to ascertain what was the intention of the parties in the words which they have used. Makepeace v. Bancroft, 12 Mass. 469; Waterman v. Johnson, 13 Pick. 261; Frost v. Spaulding, 19 Pick. 445; Kellogg v. Smith, 7 Cush. 375; Stone v. Clark, 1 Met. 378; Chester Emery Co. v. Lucas, 112 Mass. 424. 3. When the parties, having bargained for land, marked it out and set up monuments called for in the deed, defining its boundaries, but, by mistake, one of the distances named in the deed does not conform to the monuments, it is clear that the monuments control. Cleaveland, v. Flagg, 4 Cush. 76, distinguished. Opinion by MORTON, J.—*Miles v. Barrows.*

REPORT—STOPPAGE IN TRANSITU—INSOLVENCY—ATTACHMENT—RATIFICATION.—1. When a case is reported by a single justice for the consideration of the full court, and the report sets out the evidence given at the trial, which upon some points is conflicting, the report is irregular, and, if these points are material, can not be considered, but must be discharged, and the conflicting evidence submitted to the jury. 2. By a familiar rule of law a vendor of goods has the right, in case of the insolvency of the buyer, to stop the goods *in transitu*, while they remain in the hands of a carrier. Mohr v. B. & A. R. R., 106 Mass. 67. And by the "insolvency" of the buyer, is meant his inability to pay his debts in the usual course of business. It is not necessary that he should have been adjudicated a bankrupt or insolvent debtor. 3. The fact that the goods were attached by a creditor of the buyer is immaterial. Such attachment before the transit is at an end will not defeat the right of the vendor. Naylor v. Dennie, 8 Pick. 198; Seymour v. Newton, 105 Mass. 272. 4. The authority of the agent who stopped the goods *in transitu* and caused the replevin suit to be brought is sufficient, if subsequently ratified before the buyer or his assignee had obtained possession of, or made any demand for the goods. Bird v. Brown, 4 Exch. 786, distinguished. Opinion by MORTON, J.—*Durgy Cement Co. v. O'Brien.*

WILL—ERASURE—REVOCATION.—1. Under Gen. Stats., § 11, providing that "no will shall be revoked, unless by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence and by his direction," etc., it was *held*, that a cancellation by the testator of two clauses of his will by drawing lines through them after its execution, with the intention of revoking said clauses, but with no intention of revoking or defeating the other provisions of the will, constituted a valid revocation of said clauses, but did not otherwise affect the validity of the other parts of the will. The power to revoke a will includes the power to revoke any part of it. 2. It is a well settled rule of law that in a will of personal property, a general residuary bequest, in the absence of a plain intent to the contrary, carries to the residuary legatee all the personal property of the testator which is not otherwise disposed of by the will, including all lapsed legacies and all void legacies. And in this commonwealth since the passage of the Revised Statutes in 1836, the same rule applies to wills of real estate. Thayer v. Wellington, 9 Allen, 283. Opinion by MORTON, J.—*Bigelow v. Gillott.*

EQUITY—RIGHTS OF HOLDERS OF NOTE AND MORTGAGE.—The complainant made a promissory note and executed at the same time a mortgage of real estate to secure the payment of said note, and delivered both note and mortgage to J, who, before maturity, indorsed said note to the V. bank as collateral security for a loan of a larger amount, stating at the time that the note, which upon its face purported to be secured by mortgage, carried the mortgage with it. Subsequently J. undertook to sell the note with its security, but in fact substituted a forged or simulated note for the note which the mortgage was made to secure. *Held*, that a bill in equity would lie to compel the assignee of J. to hold said mortgage in trust as security for the payment of the original note; that the substituted note not being the note which the mortgage was intended to secure, and the complainant never having created a lien on his land in favor of that debt, J. could not create such a lien, but could only pass a naked legal title. Opinion by LORD, J.—*Morris v. Bacon.* [See also the case of Strong v. Jackson, decided at the same term.]

EQUITY—RIGHTS OF HOLDERS OF NOTE AND MORTGAGE.—A broker to whom was delivered a note and mortgage of real estate executed by A, for the purpose of raising a loan thereon for the latter's benefit, transferred and delivered to B, to whom he was indebted, said mortgage-note as security for such debt, without indorsing the same. Subsequently, by deed of assignment, he transferred to the defendant said mortgage, but not the note in the possession of B, the mortgagor having been induced to give what was in fact a new note through the false pretence that the note originally intended to go with the mortgage had never been signed at all. The mortgage and the assignment were duly recorded. *Held*, that a bill in equity would not lie to compel the defendant to assign said mortgage to B, or to hold the same in trust as security to the extent of B's loan to the broker. "In the absence of fraud, a conveyance by the party who appears on the record to be the owner of the mortgage should be sufficient to protect a purchaser who has no actual or constructive notice of title in any other." Welch v. Priest, 8 Allen, 165. See also Young v. Miller, 6 Gray, 152; Warden v. Adams, 15 Mass. 233; Wolcott v. Winchester, 15 Gray, 461. Opinion by AMES, J.—*Blunt v. Norris.*

BANKRUPT ACT—STAY OF PROCEEDINGS.—1. Sec. 5106 of U. S. Rev. Stat., providing for a stay of proceedings in suits at law or equity upon provable debts against a bankrupt, until the question of discharge is determined, etc., is intended not only to protect the bankrupt, to prevent his being harassed by suits while the question of his discharge is pending, and to enable him to plead his discharge in bar of the debt, but also to enable the assignee to come in and defend the suit. Ray v. Wright, 119 Mass. 426; National Bank of Clinton v. Taylor, 120 Mass. 124. 2. In the case at

bar, before judgment was entered, the defendant was duly adjudged a bankrupt, and on the same day filed in the suit a suggestion of his bankruptcy, and made application to the court to have the case stayed to await the determination of the question of his discharge. After this application the superior court had no power to proceed further in the suit. It had no more power to enter a judgment as of a former day, the effect of which would be to hold the sureties on the bond to dissolve the attachment, to render the bankrupt liable to his sureties for such sum as they might pay, notwithstanding his discharge, and thus practically to prevent his discharge from operating upon this debt, than it had to enter a judgment as of the day on which the order was made. The court can not take into consideration the fact that the defendant obtained delay by a frivolous motion for a new trial. Opinion by MORTON, J.—*Page v. Cole.*

EXCEPTIONS—RULING—NOTE OF MARRIED WOMAN.—1. When a case is tried by the court without a jury, either party may file exceptions to the decisions and rulings of the court upon matters of law arising upon such trial, in the same manner and with the same effect as upon trial by jury. Gen. Stats., ch. 129, § 67. 2. A *ruling*, therefore, that *there was no evidence* which would justify a finding of a fact in favor of the defendant is open to exception; though it would be otherwise if the court *found* that such fact did not exist. 3. A note given by a married woman before the Stat. of 1874, ch. 184, is governed by Gen. Stats., ch. 108, under which it has been held that a married woman is liable upon a note given by her for money borrowed or for goods purchased by her upon her credit and for her sole use. Wilder v. Richie, 117 Mass. 382; Allen v. Fuller, 118 Mass. 402. But it has also been held that a note or other promise of a married woman given for the accommodation of or as surety for her husband, or any third person, can not be enforced against her. Willard v. Eastham, 15 Gray, 328; Athol Machine Co. v. Fuller, 107 Mass. 437; Heburn v. Warner, 112 Mass. 271. 4. If, therefore, a married woman gave her note, secured by mortgage of her separate property, for a loan which it was mutually understood by the parties was to be applied to the use of her husband's firm, she would not be liable upon her contract—which question of extent should be determined in the court below. Opinion by MORTON, J.—*Nourse v. Henshaw.*

MARINE INSURANCE—LOSS—PRESUMPTION—EVIDENCE.—1. When an accident happens in the course of necessary repairs, the ship being upon a railway, or in dock, or hove down upon a beach, or by a wharf, it is a peril *ejusdem generis* with those named in the policy. Ellery v. New England Ins. Co., 8 Pick. 14; Devaugh v. J'Anson, 5 Bing. N. C. 519. 2. If a ship is lost, without any apparent sea damage or accident sufficient to destroy a sound vessel, there is a presumption that it proceeds from inherent weakness or decay. For such loss the insurer is not responsible, and the burden of proof is on the plaintiff, as in other cases, to show that the loss arose from a peril insured against. Paddock v. Franklin Ins. Co., 11 Pick. 227; Paddock v. Commercial Ins. Co., 104 Mass. 528. 3. The fact that a ship was seaworthy at the inception of the risk, her good conduct at sea preceding the loss, and her apparent soundness at the port where she had put in to repair a leak caused by striking against floating ice, taken in connection with the model and construction and the manner in which she was laid down upon the beach, where, when the tide left, it was found that she was badly strained, her planks had started, some of her timbers had given way, and she became a total wreck—afford evidence from which the jury might find that the loss was occasioned by putting her on the beach for repairs, and not by her inherent weakness. See Potter v. Suffolk Ins. Co., 2 Sumn. 197. Opinion by ENDICOTT, J.—*Swift v. Un. Mut. Marine Ins. Co.*

LARCENY—ASPORTATION—AGENT—RECEIVING STOLEN PROPERTY.—1. If a thief bring into this state property stolen in another state, it is a new taking and asportation in this state, and he may be here indicted for larceny of the property. Com. v. Cullin, 1 Mass. 116; Com. v. Andrews, 2 Mass. 14; Com. v. Uprichard, 3 Gray, 434; Com. v. Holder, 9 Gray, 7; Com. v. McLoon, 101 Mass. 1. 2. But when the thief sent the stolen goods into the state by an agent, the agent, not being a participant or accomplice in the original theft, could not be indicted for larceny, though he knew that the goods were stolen. 3. If a man incites an insane person, or a child, or an innocent agent, to commit a larceny in his absence, he is liable to the same extent as if personally present at the commission of the crime; and this is so, even if he was all the time in another jurisdiction. Com. v. McLoon, *supra*; People v. Adams, 3 Denio, 190; R. v. Brissac, 4 East, 164; R. v. Cooper, 5 C. and P. 535; R. v. Bannon, 2 Mood. C. C. 391; R. v. Michael, Ib. 120; R. v. Valler, 1 Cox C. C. 84; R. v. Manly, Ib. 104; R. v. Ball, Ib. 281. 4. Where an unknown person stole bonds in New York, and sent them into this state to be disposed of by an agent not an accomplice in the theft, one who takes them from the agent, knowing them to have been stolen, is criminally liable. 5. The fact that the character of the stolen property is changed before it reaches the receiver is not material, if he believes that it was stolen property. R. v. Cowell, 2 East P. C., ch. 16, sec. 48. Opinion by MORTON, J.—*Com. v. White.*

NOTES.

ACCORDING to the annual report of the acting public prosecutor of Palermo, Sicily, the whole population of that island is about 2,500,000. In 1876, 17,042 persons were tried—7,481 for crimes, and 9,561 for misdemeanors. The number of murders, and murderous assaults followed by death, was 662, besides 666 murderous assaults not followed by death; 27 extortions by threats; 31 abductions of persons. Against all this, the whole number of convictions was 13 to death; penal servitude for life, 61; for a shorter term, 290; imprisonment, 415. In 6,217 cases the prosecution was abandoned for want of proof to convict. The total number of accused escaping punishment was 10,490.

THE Supreme Court of Tennessee, in Western Union Tel. Co. v. The State, 1 Leg. Rep. (N. S.) 126, hold that telegraph lines are liable to the state and county taxes laid upon realty. "We treat the telegraph line," say the court, "as partaking of the nature of realty, in analogy to the new settled doctrine that railroads and rolling-stock necessary to their use, running alone on their track, are so treated. We are aware that this is not strictly within the definition of realty, as found in the ancient common law, but those definitions were found in a ruder age than this, and must be accommodated to the advance of the age by sound analogies, as demanded by the exigencies of our diversified development."

WE HAVE received through some kind friend a pamphlet containing the addresses delivered at the sixth annual commencement of the law department of the National University, Washington, D. C. We are not acquainted with the origin and history of this school; but from this pamphlet we learn that its founders were George Washington, Thomas Jefferson, James Madison, John Quincy Adams and Ulysses S. Grant. The President of the United States is Chancellor, *ex officio*, and delivers the diplomas, either in person or through a member of his cabinet. Twice President Grant discharged this duty in person. This year the President was represented by Hon. William M. Evarts, Secretary of State, himself an eminent lawyer. The principal address was delivered by Hon. George W. McCrary, Secretary of War. The Secretary of the Navy and Attorney-General were also present. Addresses were also delivered by Prof. Wedgewood, the Vice Chancellor, and Hon. Samuel Shellabarger of Ohio. In his address Prof. Wedgewood sketched the history of the institution, of which we may speak hereafter.

WE HAVE RECEIVED, through the courtesy of a member of the Memphis bar, an article on the "liability of factors for goods sold, where the title is in a stranger to the transaction," written by William Hunter, a lad nineteen years of age, son of the late Judge Hunter, of the Criminal Court of Memphis. Judge Hunter died poor, as nearly all honest judges do, leaving a dependent family, his oldest boy, William, being at the time but twelve years old. These boys set themselves to work to support themselves and their widowed mother, in the occupation of *newsboys*. They have succeeded, and their success is one of the most praiseworthy examples for the encouragement of the youth which we have ever known. William, the author of the paper before us, is studying law in the office of Col. Luke W. Finlay. If we may judge by this article, he promises a distinguished career. This paper certainly evinces a maturity of thought and a development of the reasoning faculty which is remarkable in a lad of nineteen. We intend to publish it as soon as our space will permit, not only on account of its intrinsic merits, but for the encouragement of all youths similarly situated.